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United States. Supreme Court

UNITED STATES REPORTS

VOLUME 139

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1890

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.

STEPHEN JOHNSON FIELD, Associate Justice.

JOSEPH P. BRADLEY, Associate Justice.

JOHN MARSHALL HARLAN, Associate Justice.

HORACE GRAY, Associate Justice.

SAMUEL BLATCHFORD, Associate Justice.

LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

DAVID JOSIAH BREWER, Associate Justice.

HENRY BILLINGS BROWN, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1890.

ST. PAUL AND PACIFIC RAILROAD COMPANY *v.* NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 54. Argued November 5, 6, 1890. — Decided March 2, 1891.

The grant of public land to the Northern Pacific Railroad Company in the act of July 2, 1864, 13 Stat. c. 217, p. 365, was a grant *in præsenti*, in the nature of a float until the route should be determined, and, after that, attaching to specific sections, capable of identification, except as to sections which were specifically reserved.

The force of such grant was in no respect impaired, or its construction affected, by the provision in section four of that act that patents for the land should be issued as sections of twenty-five miles of the road should be completed; but the company was not at liberty to dispose of its land not patented, without the consent of Congress.

When the termini of a railroad for whose construction a land grant is made are mentioned, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line.

The line of the Northern Pacific Railroad through the State of Minnesota having been definitely determined in accordance with law, and the road having been constructed, the company's right to the lands in place along the line of its route as so located, and to other lands to make up deficiencies, cannot be doubted, unless a prior right attached to those lands under an earlier grant from Congress.

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Opinion of the Court.

The several acts granting public lands in aid of the construction of the St. Paul and Pacific Railroad being examined and analyzed, it appears that the grants to that company, so far as they form the subject of controversy, were subsequent in date to the act under which the Northern Pacific Railroad Company claims, and come under the well settled rule that, where different grants cover the same premises, the elder takes the title.

The operation of the act of March 3, 1857, 11 Stat. c. 99, p. 195, upon lands previously reserved, was restrained by the act of March 3, 1865, 13 Stat. c. 105, p. 526.

The act of March 3, 1871, 16 Stat. c. 144, p. 588, does not purport to be an amendment of the act of March 3, 1857, but only authorizes a change in the lines of the company, in consideration of the relinquishment of certain lands.

The exception, in the grant to the Northern Pacific Railroad Company, of all subsequent grants prior to the definite location of its road, was not intended to cover other grants for the construction of roads of a similar character.

After the withdrawal from sale or preëmption of the granted odd sections, no interest in the granted lands, adverse to the rights of the company, could be acquired except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route was fixed.

In order to secure the grant in the finished sections it was not necessary that the road, throughout its whole length, should be fixed; but the general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company.

There was in this case no occasion for the exercise of the judgment of the Secretary of the Interior in selecting indemnity lands, as all the lands within the indemnity limits only made up in part for the deficiency.

THE case is stated in the opinion.

Mr. S. U. Pinney and *Mr. George B. Young*, for appellants.

Mr. James McNaught and *Mr. A. H. Garland*, for appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

The bill in this case was filed by the Northern Pacific Railroad Company to establish its right to land in odd-numbered sections, amounting to many thousand acres, situated in the neighborhood of Glyndon, in Minnesota, which it claims under a grant of the United States, made by the act of Congress of

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July 2, 1864, to "aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route." 13 Stat. c. 217, p. 365.

By the first section of that act, the Northern Pacific Railroad Company was incorporated, and authorized to lay out, construct and maintain a continuous railroad and telegraph line, with the appurtenances, from a point on Lake Superior, in the State of Minnesota or Wisconsin, and thence westerly by the most eligible route, as should be determined by the company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch by the valley of the Columbia River, to a point at or near Portland, in the State of Oregon.

By its third section, a grant of land was made to the company. Its language is: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Pro-*

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vided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

By the fourth section it was enacted: "That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid."

By the sixth section it was enacted: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry or preëmption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on

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the line of said road, when surveyed, excepting those hereby granted to said company."

By the express declaration of the act the grants were made and the rights and privileges were conferred upon and accepted by the company, on the condition that it should commence work on the road within two years from the approval of the act by the President, and complete and equip the whole road by the 4th of July, 1876; and the further condition that, if the company should make any breach of the conditions of the grants, and allow the same to continue for upwards of one year, then at any time thereafter the United States might "do any and all acts and things" needful and necessary to insure a speedy completion of the road. (Secs. 8 and 9.) Subsequently a joint resolution was passed by Congress extending the time for the commencement of the road to July 2, 1868, and for its completion to July 4, 1878. 14 Stat. 355, Sec. 2.

As seen by the terms of the third section of the act, the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preëmption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is "that there be, and hereby is, granted" to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.

The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

This is the construction given to similar grants by this court, where the question has been often considered; indeed,

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it is so well settled as to be no longer open to discussion. *Schulenberg* v. *Harriman*, 21 Wall. 44, 60; *Leavenworth, Lawrence &c. Railroad Co.* v. *United States*, 92 U. S. 733; *Missouri, Kansas &c. Railway Co.* v. *Kansas Pacific Railway Co.*, 97 U. S. 491; *Railroad Co.* v. *Baldwin*, 103 U. S. 426. The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of *Rice* v. *Railroad Co.*, 1 Black, 358; but unless qualified they are to receive the interpretation mentioned.

It is contended that they are qualified, and restricted by the provision of the fourth section, that whenever twenty-five miles of the road are completed in a good, substantial and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the President, patents shall be issued "confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road." This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands as coterminous with the completed section, but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title. As deeds of further assurance they would thus be of great value in giving quiet and peace to the grantee's possession. There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. The previous grant or confirmation is in no respect impaired thereby, or its construction affected. See on this point *Langdeau* v. *Hanes*, 21 Wall. 521; *Wright* v. *Roseberry*, 121 U. S. 488, 497.

Although the restraints in the act against the sale or aliena-

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tion of the lands when once identified are not the subject of consideration in the present case, it may be well, to obviate misapprehension, to observe that the company, notwithstanding its possession of the title, was not at liberty to dispose of the lands without the consent of Congress, except as each twenty-five mile section was completed and accepted by the President, so as to deprive the United States of the right to compel their application to the purposes of the grant, or so as to prevent their forfeiture in case of the company's failure to comply with its conditions. Congress in allowing a mortgage upon the land, and in other ways, may have granted permission to the company to use and dispose of the lands or a portion thereof, but with this we are not now concerned. The construction we give to the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the property to the construction of the road and telegraph line, and thus carries out the purposes of the government, but also secures the company against any attempted alienation of the land to other parties.

Having expressed our opinion as to the character of the title which Congress conveyed to the Northern Pacific Railroad Company by the act of July 2, 1864, we proceed to consider whether it was, by a subsequent location of the contemplated road, made to cover the lands for which the present suit is brought.

The general location of the route of the Northern Pacific Railroad was designated in 1869, and a map of it, approved by the Secretary of the Interior, was filed in the office of the commissioner of the general land office in August, 1870; and thereupon the Secretary ordered the withdrawal by the local land officers in Wisconsin and Minnesota, from sale, preëmption, homestead and other disposal, of the odd-numbered sections not sold or reserved, and to which prior rights had not attached, within twenty miles on each side of the said line, for the benefit of the company. Subsequently this general route in Minnesota was changed, and a map corrected in accordance with the change, approved by the Secretary of the Interior, was filed in the general land office, on the 8th of October,

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1870, and on the 12th of that month the Secretary ordered the withdrawal of the lands in conformity with the new general route adopted. The company then proceeded with the work of definitely locating the line of the road through that State, and on the 21st of November, 1871, filed in the office of the commissioner of the general land office a map or plat of the line thus definitely fixed, approved by the Secretary of the Interior. The company subsequently constructed and equipped the road through that State in all respects as a first-class railroad, and has since operated and maintained it. The road was accepted and approved by the President in accordance with the provisions of the fourth section of the act of July 2, 1864.

By the joint resolution of Congress of May 31, 1870, it was provided that in the event that there was not in any State or Territory, in which the main line or a branch of the road of the company might be located, the amount of lands per mile granted by Congress, within the limits prescribed by its charter, then the company should be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory within ten miles on each side of the road, beyond the limits prescribed in the charter, as would make up the deficiency, on the said main line or branch, in the amount of lands that had been granted, sold, reserved, occupied by homestead settlers, preëmpted or otherwise disposed of, subsequent to the passage of the act of July 2, 1864. 16 Stat. 378.

After a map of the general route of the road of the plaintiff was filed, as above stated, and the line of the road in Minnesota was definitely fixed, the commissioner of the general land office designated, upon maps and records in his office, the limits of the lands granted by Congress to the plaintiff, according to the provisions of the act of 1864, and the above joint resolution, namely, the twenty, thirty and forty-mile limits on each side of the line of definite location, the first named being the limits of the lands in place; the second, the limits of the indemnity lands; and the third, or forty-mile limit, the limits of

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the further indemnity granted by the joint resolution of May 31, 1870. And upon such designation it was found that there was not in the State, within those limits, at the time of the final location of the road, the amount of lands intended by the grant of Congress for the plaintiff, not previously granted, sold, occupied by homestead settlers, preëmpted or otherwise disposed of.

The right of the plaintiff, the Northern Pacific Railroad Company, to the lands in place along the line of its route as definitely located in the State of Minnesota, and to other lands, to make up deficiencies within those limits, caused by previous grants, sales, reservations, settlements or preëmptions, to be taken from the indemnity limits, or within the forty-mile withdrawal, will not admit of serious doubt, unless a prior right attached to those lands by an earlier grant of the United States. Such earlier grant is asserted by the defendants under the act of Congress of March 3, 1857, and subsequent legislation changing its operation. 11 Stat. c. 99, p. 195. By that act there was granted to the Territory of Minnesota, for the purpose of aiding in the construction of certain railroads therein mentioned, one of which was a railroad from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the legislature of the Territory might determine, every alternate section of land, designated by odd numbers, for six sections in width, on each side of said road and branches. It was also provided that the Territory or future State might select, subject to the approval of the Secretary of the Interior, from any lands of the United States nearest to the tiers of sections specified, so much land, in alternate sections or parts of sections, as should be equal to such of the granted lands as the United States might have sold or appropriated, or to which rights of preëmption might have attached when the lines or routes of the road and branches were definitely fixed. It was further provided that the lands so located should in no case be further than fifteen miles from the lines of the road and branches.

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On the 22d of May, 1857, the legislature of Minnesota passed an act to execute the trust imposed by the act of Congress, and created a corporation, called the Minnesota and Pacific Railroad Company, with power to locate, build and operate a railroad, in conformity with that act, from Stillwater, by way of St. Paul and St. Anthony, via Minneapolis, to the town of Breckinridge on the Sioux Wood River, with a branch from St. Anthony, via St. Cloud and Crow Wing, to St. Vincent on the Red River of the North, and to aid in the construction of that road and branches conveyed all of its interest in the lands granted by the United States for that purpose.

In November, 1857, this railroad company thus created located the entire main line of its road and that portion of the branch line from St. Anthony via Anoka and St. Cloud to Crow Wing, and the maps of definite location thereof were approved by the Secretary of the Interior and filed in the general land office in December of that year.

In July, 1858, that railroad company executed a mortgage to trustees upon its railroad, and all its alienable franchises, and the rights and interest which it had acquired or might acquire in the lands granted by the Territory, to secure the payment of certain bonds which the Territory had authorized it to issue. The company having defaulted in the payment of those bonds, the mortgage was foreclosed, the property was sold, and the State of Minnesota, which had superseded the Territory, became the purchaser.

Subsequently in March, 1862, its legislature passed an act by which all the rights, franchises, property and interests of the Minnesota and Pacific Railroad Company thus acquired by the State were granted to certain persons named, their associates and successors, who were incorporated by the name of the St. Paul and Pacific Railroad Company. The grant of the State was accepted by that company, with all its conditions.

In July 1862, it became evident that it would be more advantageous for the St. Paul and Pacific Railroad Company, and for the State of Minnesota, that the line of branch railroad which was authorized to be constructed should be changed,

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and to accomplish this Congress, on the 12th of that month, passed the following joint resolution:

"*Whereas* by an act of Congress approved March third, eighteen hundred and fifty-seven, there was granted to the Territory of Minnesota lands to aid in the construction of a railroad from Stillwater, via St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch, via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, the northern terminus of which was fixed by the legislature of said Territory at St. Vincent; and whereas it is now believed that the public interests require a change of location of a part of said branch road; *Therefore*, —

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That in lieu of that part of the railroad grant to Minnesota Territory by act of Congress approved third March, eighteen hundred and fifty-seven, which extends northwesterly from the intersection of the tenth standard parallel with the fourth guide meridian, there shall be granted to the State of Minnesota the alternate sections within six-mile limits of such new branch line of route as the authorities of the State may designate, having its southwestern terminus at any point on the existing line, between the Falls of St. Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior, with a right of indemnity between the fifteen-mile limits thereof, provided this resolution shall take effect from the filing in the general land office of the acceptance by the authorities aforesaid of such substitution; whereupon the land north of the intersection aforesaid in the grant as authorized by the said act of third March, eighteen hundred and fifty-seven, being by said acceptance disencumbered of the railroad grant, shall be dealt with as other public lands of the United States." 12 Stat. pp. 624, 625.

On the 6th of March, 1863, the legislature of Minnesota accepted the terms and provisions of this joint resolution by an act approved on that day, an authenticated copy of which was subsequently, on February 26, 1864, filed in the general land office.

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On the 28th of May, 1864, the board of directors of the St. Paul and Pacific Railroad Company adopted the following resolution:

"*Resolved by the Board of Directors of the St. Paul and Pacific Railroad Company*, That the terms, conditions and provisions of the joint resolution of the Congress of the United States, approved July 12, 1862, entitled 'A joint resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State, and for other purposes,' and also the terms, conditions and provisions of the act of the legislature of the State of Minnesota, approved March 6, 1863, entitled 'An act to authorize the St. Paul and Pacific Railroad Company to construct a branch road to Lake Superior,' and also the terms, conditions and provisions of the act of the legislature of the State of Minnesota, approved March 4, 1864, entitled 'An act to extend the time for the construction of the branch road of the St. Paul and Pacific Railroad Company,' be, and the same and each and every of them are, hereby approved, accepted and assented to by the St. Paul and Pacific Railroad Company, and the president and secretary of this company are hereby directed to transmit a duly certified copy of this resolution to the governor of the State."

The resolution was accordingly transmitted to the governor.

The joint resolution of Congress of July 12, 1862, and its acceptance by the State of Minnesota and the St. Paul and Pacific Railroad Company, established the intersection of the tenth standard parallel with the fourth guide meridian as the northern terminus of the branch line. That portion of the country in Minnesota which was northwesterly of the intersection was thus disencumbered of the railroad grant under the act of March 3, 1857. And that portion south of the intersection and west of the route of the branch road definitely located, composing the alternate sections granted, was distant many miles east of the lands in controversy in this suit. The act of 1857 provided for the construction of a railroad from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing

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to the navigable waters of the Red River of the North, at such point as the legislature of the Territory might determine. By the change effected this branch was to be constructed north only to the intersection designated, and a direct line via St. Cloud and Crow Wing to that point would also be a long way from the lands in controversy. When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant. The route via St. Cloud and Crow Wing to the intersection mentioned would be almost in a direct northerly line; a route via those places to Glyndon would involve a westerly deviation of nearly a hundred miles. Of course such a detour from a direct line would be inadmissible. And as to the new branch authorized to Lake Superior, that would be only in an opposite direction.

It is, however, earnestly contended by the appellants that they are entitled to the lands in question by the subsequent acts of Congress of March 3, 1865, and March 3, 1871; and to these acts we now turn our attention.

The act of March 3, 1865, "extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," 13 Stat. c. 105, p. 526, in its first section increases the grant made to Minnesota by the act of March 3, 1857, to aid the construction of certain railroads, from six alternate sections per mile on each side of such roads and branches to ten sections per mile. Its second section enlarges the indemnity limits from fifteen to twenty miles from the lines of the roads and branches. Its third section excepts from the operation of the act any lands previously reserved by act of Congress or in any other manner by competent authority, to aid in any object of internal improvement or other purpose. The ninth section declares that the provisions of the act shall "be construed so as to apply and extend to that portion of the line authorized to be vacated.

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by the joint resolution approved July 12, 1862, entitled 'A joint resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State, and for other purposes,' notwithstanding the vacation thereof by said State, as though said joint resolution had not passed, and also to the line adopted by said State in lieu of the portion of the line so vacated."

This act makes an additional and new grant to Minnesota of four sections of land per mile to aid in the construction of its railroads, and enlarges the indemnity limits from fifteen to twenty miles; and the provisions of its ninth section being applied and extended to that portion of the line between the intersection of the tenth standard parallel with the fourth guide meridian and St. Vincent, vacated by the joint resolution of July, 1862, and also to the line running eastwardly to Lake Superior, authorized in lieu of the vacated line, in effect made a new grant between St. Vincent and the intersection mentioned, and enlarged the grant for the line to Lake Superior.

On the 3d of March, 1871, Congress passed an act authorizing another change to be made by the St. Paul and Pacific Railroad Company in its lines, "in consideration of a relinquishment of lands." That act is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the St. Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct, in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines, as is provided for the present lines by existing laws: *Provided, however*, That this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being

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in accord with the legislation of the State of Minnesota, and upon the further condition that proper releases shall be made to the United States by said company, of all lands along said abandoned lines from Crow Wing to St. Vincent and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market, without further legislation." 16 Stat. c. 144, p. 588.

The act of March 3, 1865, as said above, is a new grant, referring to, but distinguishable and distinct from, that made by the act of March 3, 1857. The act of March 3, 1871, only authorizes the construction of different lines from those previously designated, in consideration of the relinquishment of lands along the previously designated lines, the new lines to have the same proportional grant along them to be taken in the same manner as along the former lines.

These two acts are subsequent in date to the act under which the plaintiff claims, and the rule has long been settled that where different grants cover the same premises the earlier takes the title. There would be no reason why that rule should not be followed in the present case if the act of March 3, 1871, should be held to cover the premises in controversy.

It is, however, contended, in answer to this position of an earlier grant to the plaintiff, that the acts of March 3, 1865, and March 3, 1871, are to be treated, not as distinct acts, but simply as amendments to the act of March 3, 1857, and to be given an operation as of that date. We do not assent to this position. Though the act of March 3, 1865, by its new and additional grants, amended the previous act of 1857, its operation upon any lands previously reserved to aid in any work of internal improvement was expressly restrained. What was reserved before remained reserved afterwards. And the act of 1871 does not purport in any sense to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines in consideration of the relinquishment of certain lands. The old lines were to be given up, and all the benefits attached to them, in consideration of which new lines were authorized. The old lines were

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not amended, but were abandoned. There was no partial release of the accompanying grants, but whatever rights attended the original lines were to be surrendered.

It is also urged against the priority of the plaintiff's claim that by the terms of the act making the grant to the Northern Pacific Railroad Company all subsequent grants prior to the definite location of its road are excepted.

Giving full force to this exception, we do not see that it has any application in the present case. It can only apply to grants of land which would otherwise be covered by the Northern Pacific grant, and the only grant which it is contended was in that situation, is the one accompanying the authority given by the act of March 3, 1871, to construct, in lieu of certain lines to be abandoned, a line from St. Cloud to a point of intersection with the line of what was termed the original grant, at or near Otter Tail or Rush Lake; though what was intended was the line projected in 1869, but which was never accepted by the Secretary of the Interior, because of its plain deviation from a direct line between the termini of the road authorized. The line of the original main grant was a long way distant from those lakes, to the south of them; and no line was located to intersect it, or authorized with that view. The line authorized, or supposed to be authorized, under the act of March 3, 1871, was distant many miles from the line projected in 1869, and the map of its definite location, approved by the Secretary of the Interior, was not filed with the commissioner of the general land office until December 20, 1871. The release required by the act of March 3, 1871, was not made by the St. Paul and Pacific Railroad Company until December 13, 1871, and a formal release to the United States by the company was not executed until the 19th of that month. It was only upon the execution of the release — whether that be deemed to have been on the 13th or 19th of December — that the act took effect. The act did not make a grant upon condition subsequent. There was no condition for a breach of which any forfeiture of a grant could be required, for no grant passed until the consideration for it, the relinquishment of old lines with the lands along them, was

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given. The transaction was in the nature of an exchange, by which the right was given to the company to construct new lines with proportional grants, in consideration of its relinquishing certain old lines, with their accompanying lands. The new rights were to vest with the release of the old rights. The transfer was to be mutual and simultaneous. There was, therefore, no operative grant until there was an effective release, and whichever date be taken — whether December 13 or 19 — it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. A map of that location, approved by the Secretary of the Interior, was filed, as stated above, in the office of the commissioner of the general land office on the 21st of the previous November. No grant, therefore, was in existence of any lands to any other company, which are claimed by the plaintiff in this suit, at the time of the definite location of its route. The act of March 3, 1865, as already stated, is expressly restrained from in any way interfering with any lands previously reserved by Congress or any competent authority to aid in any work of public improvement. Consequently, under that act no claim could be asserted that would in any way interfere with the grants to the Northern Pacific Railroad Company.

But independently of this conclusion, we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491, 498, 499.

Besides, the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles

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in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or preëmption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.

In the recent case of *Buttz* v. *Railroad Company*, 119 U. S. 55, 72, this court, speaking of the act making the grant to the Northern Pacific Company, said:

"Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preëmption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."

After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed.

It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route for the whole length of the road. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about two thousand miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach.

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The general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any case would only extend along the route which was fixed, and a map of which was filed in the department.

As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated.

Upon the whole case we are satisfied that the decree of the court below was correct, and it is accordingly

Affirmed.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY v. GREENALGH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 24. Argued and submitted November 6, 1890. — Decided March 2, 1891.

When a statute extends the time for the completion of a land grant railroad, upon the condition of saving and securing to actual settlers and their grantees on any of the granted lands their rights in all respects the same as if said lands had never been granted to aid in the construction of said lines of railroad, and the company asserts and continues to assert and exercise ownership over the road and other property, after the expiration of the time for completing the road, to the same extent as previously, it will be presumed, in the absence of proof to the contrary, that the company has accepted the conditions imposed, and that it has relinquished all claim to the lands thus settled and occupied.

THE case is stated in the opinion.

Mr. S. U. Pinney for appellants.

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Mr. S. J. R. McMillan for appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

The plaintiff, the St. Paul, Minneapolis and Manitoba Railway Company, is a corporation created under the laws of Minnesota. The defendants are citizens of that State; and James Greenalgh, the grantee of his co-defendant, Charles W. Greenalgh, who received a patent of the United States, claims title to the land covered by that patent. The controversy in the case is over the ownership of this land, the plaintiff contending that it is a part of the grant made by Congress to the State of Minnesota on the 3d of March, 1857, to aid in the construction of certain railroads, and by the State conveyed to the St. Paul and Pacific Railroad Company, to the rights of which the plaintiff has succeeded. The defendants controvert this position, contending, first, that the premises in controversy were never covered by the grant to the State, and therefore never passed by its conveyance to the St. Paul and Pacific Railroad Company; and, second, that if they were a part of that grant, and by the conveyance of the State passed to that railroad company, the extension of the time to complete the road, which it was authorized to construct, released them from its claim.

In the case of the *St. Paul and Pacific Railroad Company* v. *The Northern Pacific Railroad Company*, *ante*, 1, we had occasion to consider somewhat at length the grant of Congress to the State of Minnesota by the act of March 3, 1857, and the changes in it by subsequent legislation, particularly by the joint resolution of Congress of July 12, 1862, authorizing a change in the line of one of the branch railroads, and by the act of March 3, 1865, increasing the alternate sections granted on each side of the road from six to ten sections, and enlarging the indemnity limits from fifteen to twenty miles, and the act of March 3, 1871, authorizing a change of certain designated lines in consideration of the relinquishment of lands along them.

In the year 1871 the St. Paul and Pacific Railroad Com-

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pany under the assumed authority of the act of March 3, 1871, located the line of a road from St. Cloud to St. Vincent, passing through Glyndon and Crookston, differing and distinct from the definite location made by the predecessor of that company in 1857. On the 7th of November, 1871, a map of this new location, certified by the officers of the company, was filed with the governor of the State, and on the 20th of December following a copy, properly certified and approved by the Secretary of the Interior, was filed in the office of the commissioner of the general land office. Afterwards, by an act of Congress, passed March 3, 1873, 17 Stat. c. 331, p. 631, this location was recognized and virtually approved, by an extension of time to the company for the completion of the road as thus located within nine months from the time previously prescribed. Whatever doubt as to the regularity or validity of the location might otherwise arise, there can be none of its validity from the time of this recognition.

On February 15, 1872, after the map of definite location was filed, the Secretary of the Interior ordered a withdrawal from sale or other disposition, of the odd-numbered sections within twenty miles. On June 18, 1872, the Secretary directed the vacation of this order. On the 26th of June the defendant, Charles W. Greenalgh, settled on the land in controversy, which is within ten miles of the line of the road, and within its place limits. See *Barney* v. *Winona & St. Peter Railroad*, 117 U. S. 228, 231, correcting in this particular the decision in 113 U. S. 618. After the settlement, he resided upon the land and made improvements thereon. He subsequently filed and proved up his claim, and obtained a patent of the United States. On September 4, 1872, the order of vacation was duly revoked. As thus seen the settlement of this defendant was commenced during the period when the withdrawal of the lands from sale or other disposition was not in force.

The act of Congress of June 22, 1874, 18 Stat. c. 424, p. 203, in its first section declares that it extends to the St. Paul and Pacific Railroad Company the time for the completion of its roads to March 3, 1876, and "no longer, upon the following

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conditions: That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or other such persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad."

In its second section it required the company, as a condition of acquiring any rights under the act, to sign a formal acceptance of its conditions, and file such acceptance in the Department of the Interior for record and preservation. It does not affirmatively appear that any such acceptance was ever signed; but as the company continued to assert and exercise ownership over the road and other property, after the expiration of the time for completing the road, to the same extent as previously, it will be considered, in the absence of proof to the contrary, as having in fact accepted the conditions imposed, and relinquished all claim to the lands thus settled upon and occupied.

It seems also that the State of Minnesota, on the first of March, 1877, enacted that the railroad company should not, "in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim or demand in or to any piece or parcel of land . . . upon which any person or persons have in good faith settled, and made or acquired valuable improvements thereon, on or before the passage of the act."

The road of the plaintiff under consideration here was not completed till November, 1878, and consequently the rights granted to the company were subject to forfeiture, or at least the company was subject to hostile proceedings, for breach of this condition attached by law to the grant. A mere breach of condition does not of itself work a forfeiture of a grant; some other proceeding must be taken by the grantor to indicate his dissatisfaction with the breach and his intention to exercise his rights to revoke the grant and take possession of the property in consequence thereof. While in this case no specific action was taken by Congress to work a forfeiture of

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the grant, or by the State, yet the continued possession and use of the property by the company were, in fact, subject to the condition that the rights of settlers upon the lands at the time should not be interfered with, where such settlements had been made in good faith, as was the case in the present instance. And it would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to avoid any forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made.

We think, therefore, that the defendant James W. Greenalgh, under the patent issued to his co-defendant Charles, upon proof of the latter's settlement and subsequent improvements, had the better right to the land in controversy, and the decree of the court below is

Affirmed.

THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY *v.* WENZEL. Appeal from the Circuit Court of the United States for the District of Minnesota. No. 25. Argued and submitted March 6, 1890. MR. JUSTICE FIELD. This case involves the same question decided in *St. Paul, Minneapolis and Manitoba Railway Company* v. *Charles W. Greenalgh and James Greenalgh*, and upon the authority of that case the decree will be

Affirmed.

Mr. S. U. Pinney for appellants.

Mr. S. J. R. McMillan for appellees.

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CENTRAL TRANSPORTATION COMPANY *v.* PULLMAN'S PALACE CAR COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 379. Argued January 28, 29, 1890. — Decided March 2, 1891.

A statute of a state, which authorizes the judge presiding at the trial to order a judgment of nonsuit to be entered, when in his opinion the evidence introduced by the plaintiff is insufficient in matter of law to sustain a verdict, may be followed, under Rev. Stat. § 914, in the Circuit Court of the United States held within that state; and a judgment of nonsuit rendered accordingly, upon a ruling in matter of law duly excepted to, may be reviewed by this court on writ of error.

A corporation, formed by articles of association, called a certificate or charter, under the general laws of Pennsylvania concerning manufacturing companies, with a certain capital stock, for twenty years, for "the transportation of passengers in railroad cars constructed and owned by the said company" under certain patents, carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting the cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers. Seven years afterwards, by a special act of the legislature of Pennsylvania, the charter was extended for ninety-nine years, and the corporation was empowered to double its capital stock, and "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal property." The corporation forthwith entered into an indenture with a corporation of another state engaged in a similar business, by which it leased and transferred to that corporation all its cars, railroad contracts, patent rights and other personal property, moneys, credits and rights of action, for the term of ninety-nine years, except so far as the contracts and patents should expire sooner; and covenanted not to "engage in the business of manufacturing, using or hiring sleeping cars" while the indenture should remain in force; and the lessee covenanted to pay all existing debts of the lessor, and to pay to the lessor annually the sum of $264,000, during the entire term of ninety-nine years, unless the indenture should be sooner terminated as therein provided. *Held*, That this contract was unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of its duty to the public; and therefore no action could be maintained by the lessor upon the contract, or to recover the sums thereby payable, even while the lessee had enjoyed the benefits of the contract.

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Statement of the Case.

THIS was an action of covenant, brought September 21, 1886, by the Central Transportation Company, a corporation of Pennsylvania, against Pullman's Palace Car Company, a corporation of Illinois, to recover the sum of $198,000, due for the last three quarters of the year ending July 1, 1886, according to the terms of an indenture of lease from the plaintiff of all its personal property to the defendant, dated February 17, 1870, and set forth in full in the declaration.

The defendant filed several pleas, one of which was "that said indenture of lease was void in law as between the parties thereto, for the want of authority and corporate power on the part of the parties thereto to make and enter into said indenture of lease; and for that the same was in excess and in violation of the charters conferring the corporate powers on said plaintiff, and of the purpose of their incorporation." The plaintiff filed a replication, traversing the averments of this plea.

The plaintiff was originally incorporated December 26, 1862, by a certificate or charter, made, acknowledged, recorded and filed in the office of the secretary of the commonwealth, as required by the general laws of Pennsylvania, which authorized companies to incorporate themselves, by voluntary act of the associates, "for the purpose of carrying on the manufacture of woollen, cotton, flax or silk goods, or of iron, paper, lumber or salt," or "for the manufacture of articles from iron and other metals, or out of wood, iron and other metals," within the State, for a term not exceeding twenty years; and provided that every corporation so formed might by its corporate name purchase, hold and convey real or personal property, "necessary or convenient to enable the said company to carry on the business or operations named in such certificate;" and that its stock, property and affairs should be managed by a board of directors, a majority of whom in all cases should be stockholders therein and citizens of the State; and authorized the directors, subject to the revision and approval of the stockholders, to make such by-laws for the management and disposition of its stock and affairs, "and for carrying on all kinds of business within the objects and purposes of such company;"

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and forbade the company to use any part of its capital stock or other funds in the purchase of stock in any other corporation. Penn. Stats. April 7, 1849, c. 368, §§ 1, 3, 4, 8; April 1, 1853, c. 186, § 2.

In accordance with the requirements of those statutes, the plaintiff's certificate of incorporation, or charter, stated the object for which it was formed, "the transportation of passengers in railroad cars constructed and to be owned by the said company in accordance with the several letters patent," four in all, described by numbers and dates; the place where its chief operations were to be carried on, Philadelphia; the amount of its capital stock, $200,000; and its term of continuance, twenty years, the extreme limit allowed by the statutes.

By a special act of the legislature of Pennsylvania of February 9, 1870, c. 94, entitled "An act to extend the charter of the Central Transportation Company, to empower them to lease their property and increase their capital stock," the plaintiff's charter was extended for ninety-nine years from its expiration; and "said company are hereby empowered to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them, of their railway cars and other personal property," as well as "to increase their present capital stock two hundred thousand dollars."

On February 17, 1870, eight days after the passage of that act, the indenture sued on was made by and between the plaintiff and the defendant, which had been incorporated three years before, with a capital stock of $100,000, by a special act of the legislature of Illinois of February 22, 1867, (declared to be a public act,) "to manufacture, construct and purchase railway cars, with all convenient appendages and supplies for persons travelling therein, and the same" to "sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper."

The indenture, after the statement of the names of the parties, began with the following recitals:

"Whereas the parties hereto are engaged in the business of manufacturing railway cars, generally known as sleeping cars,

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under certain patents belonging to them respectively, and of hiring the same to railroad companies under written contracts, to be used and employed on and over the lines of the roads of said railroad companies, and receiving therefor income and revenue by the sale to passengers of the berths and accommodations therein; and

"Whereas the demands of the public for increased means of personal comfort and convenience in travelling, of avoiding repeated changes of cars over long routes of railroad, the necessity for affording, at fair and reasonable rates, these advantages, which cannot be extended by railroad companies themselves, require that every possible means should be adopted to meet such demands by avoiding the inconvenience and curtailing the expenses incidental to the maintenance of the business management and organization of two separate corporations."

It further recited that the parties (professing to act under the powers conferred upon them respectively by the special acts of the legislatures of Pennsylvania and of Illinois, above mentioned,) had agreed that the plaintiff should demise, transfer and set over to the defendant, and the defendant should take, all the plaintiff's railway cars, contracts, patent rights and personal property.

By that indenture, accordingly, the plaintiff "granted, demised, transferred and set over" one hundred and nineteen railway sleeping cars with their equipment, its contracts with sixteen railroad companies, (copies of which were annexed to and made parts of the indenture,) all its patent rights, (an assignment of which, including the four specified in its charter and thirteen others, was also annexed to the indenture and made part thereof,) and all its "personal property, rights, credits, moneys and effects, rights of action, money due and to become due from licenses heretofore granted," to the defendant, its successors and assigns, "to have and to hold the above demised property, and all income, revenue and profit to be derived therefrom," for the term of ninety-nine years from January 1, 1870, except so far as the contracts, patents and licenses should expire sooner; and the plaintiff expressly cove-

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nanted that it would use its influence to obtain renewals or new contracts in the defendant's name from the railroad companies; and that it "shall and will not engage in the business of manufacturing, using or hiring sleeping cars, while this contract remains in full force and effect."

The defendant, on its part, covenanted to pay to the plaintiff annually the sum of $264,000, in equal quarterly instalments, "during the entire term of ninety-nine years," unless, upon a diminution of the revenue received from the railroad companies, the indenture should be declared void by the defendant, or the annual sums payable by the defendant be reduced, as therein provided; also to pay all the plaintiff's debts up to January 1, 1870, according to a schedule annexed, by which they were not to exceed the sum of $63,998.69, that being the amount of cash transferred by the plaintiff to the defendant; to continue and carry on the business as authorized by its charter, during the existence of the assigned contracts or other like contracts with the same railroad companies; to keep in repair the cars and their equipment, and to renew and reconstruct them when needful; not to assign the indenture without the plaintiff's assent, nor to create any lien or mortgage upon the property that should impair the plaintiff's rights under the indenture; that, upon the defendant's failure to make any quarterly payment for thirty days after due, the plaintiff might avoid the indenture, and thereupon the defendant should surrender the cars and equipment, assign to the plaintiff the contracts with the railroad companies and any unexpired patent rights, and cease to run or employ cars on the same lines of railroad; and, at the end of the ninety-nine years, to deliver to the plaintiff the cars and equipment in good order, and assign to the plaintiff any unexpired contracts with those railroad companies.

At the trial, in May, 1888, the plaintiff offered in evidence its original charter, the statute of Pennsylvania of February 9, 1870, and the indenture of February 17, 1870; as well as evidence tending to show that the defendant, under that indenture, entered into possession of the plaintiff's property, and continued in possession during the period covered by the declaration.

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To the admission of all this evidence the defendant objected, "on the ground that it was beyond the power of either corporation to make the contract; and also because it was null and void by reason of its being in restraint of trade and against public policy as preventing competition." The court sustained the objection, and excluded the evidence; and the plaintiff excepted.

The plaintiff then offered to prove, in addition to the above evidence, that in pursuance of the indenture of February 17, 1870, the plaintiff's cars, contracts and patent rights were delivered to the defendant, and continued in its possession under the indenture, and the defendant insisted on retaining them, until July 1, 1886, and the defendant then for the first time tendered them to the plaintiff and declared the indenture void, in accordance with its provisions. The defendant objected to this evidence; the court sustained the objection, and excluded the evidence; and the plaintiff excepted.

The defendant thereupon moved for a nonsuit, and the court granted the motion, and ordered a nonsuit, and refused a motion of the plaintiff to take it off; and the plaintiff again excepted. A judgment of nonsuit was entered accordingly; and the plaintiff tendered a bill of exceptions, which was allowed by the court, and sued out this writ of error.

Mr. John G. Johnson for plaintiff in error.

I. This contract was not *ultra vires*.

This case differs from *Thomas* v. *Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad Co.* v. *St. Louis, Alton &c. Railroad Co.*, 118 U. S. 290, 307; and *Oregon Railway Co.* v. *Oregonian Railway Co.*, 130 U. S. 1, in that no privilege was conferred upon the Central Transportation Company, which required the performance of some duty as an equivalent. It never became a trustee for the public to discharge a duty because of a privilege conferred. It was vested with a franchise to be a corporation, to use a seal, and to act without its members becoming individually liable, saving to a certain extent, for its debts. It was permitted to do nothing which could not be done by an individual. Its sole power

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was to manufacture cars under specified patents. It was in precisely the same position as that of a limited liability company, which is only permitted to do what may be done by individuals; which is not a corporation; but which, under the laws of Pennsylvania, may use a common seal, and may act without its members being liable for its debts.

It does not require an act of Assembly to permit a railroad corporation to sell such of its real and personal property as is not necessary for the exercise of its franchises. None of the property acquired by a manufacturing company is necessary to the exercise of its power to manufacture; because it may locate other property at any point which may please it, and may there carry on its business. A railroad corporation, however, is only authorized to locate a road between certain termini. After it has located the same, its power further to locate is at an end. Its right of way, therefore, becomes absolutely necessary to the continuance of its railroad. There is, therefore, a very obvious reason for requiring that such property, so necessary to the exercise of the *quasi* public franchise, shall not be disposed of. There is no such reason in the case of a manufacturing corporation, which may build, or buy, as many mills as it may see fit.

The Central Transportation Company, though called a "transportation company," was, as we have said, a manufacturing corporation, with no right to transport, saving as the same resulted from its right to use the cars which it might manufacture. In selling or leasing such cars it exercised a right of ownership incidental to its right to manufacture, as much as was that to transport, and it violated no duty to the public such as it would have owed to it if it had acquired property under the right of eminent domain, or had been vested with a power to do some act for the public benefit, by legislative grant, which it was not competent for individuals to perform.

At the time of the lease the whole capital of the company had been invested in its cars, its patents and its contracts. Even if it was under an obligation to the State to manufacture, it had performed it by investing in such operation its

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whole authorized capital. It was at liberty, after it had done this to sell the property, and it was under no obligation to reinvest the proceeds in further manufacturing.

Even if it had sold all its cars and patents, and had refused to manufacture other cars, and even if such refusal would have been cause for a forfeiture, it was only competent for the Commonwealth, by writ of *quo warranto*, to work such forfeiture. It is not open to any person other than the Commonwealth, to complain that a private corporation deserves a writ of ouster because of its non-exercise of its franchises. Of course, the case is different with a *quasi* public corporation; for there the public have a right to demand that the property which it has acquired under the right of eminent domain, shall be used for the benefit of those whose rights alone justified its grant. This right the court will make efficacious whenever a person in interest asks it so to do.

The distinction between *quasi* public, and ordinary trading corporations, is one that is much more than hinted at in *Thomas* v. *Railroad Company*, *supra*, and is very clearly stated in the text-books, and in many of the cases. Taylor on Private Corporations, §§ 131, 132; Morawetz on Corporations, §§ 1025, 1129; *Ardesco Oil Co.* v. *North American Mining Co.*, 66 Penn. St. 375, 381.

Further, the lease was not *ultra vires* in view of the act of February, 1870. This act antedates the lease by but a few days, and we may fairly infer that it was passed to set at rest any doubt which might possibly be raised as to the validity of what must then have been under contemplation. The lease, made within a few days after the passage of this act, has continued to be acted upon, without question as to its validity, for sixteen years. By virtue of this lease the Pullman Company has possessed itself of all the property and business of the plaintiff. If the decision of the court below is sustained, it will retain everything that is valuable, and which it could never have acquired but for this lease, and will be obliged to return nothing but worthless cars.

It was thought by the court below that the legislature could not have intended to permit this lease to be made, because it

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extended the charter of the company for ninety-nine years, and permitted the capital to be increased. It was necessary to extend the charter, which would expire in some twelve years, in order that the corporation might make a lease of longer duration than would otherwise have been possible. The extension of the charter was even more necessary than was the giving of the power to lease and transfer. We can hardly suppose that the authority to increase the capital was conferred because the legislature intended to put upon the company the duty of manufacturing more cars. In point of fact, the capital stock was increased to permit the issue of a stock dividend. Though there is no evidence of this before this court, it can conceive of many reasons why the capital was permitted to be increased without supposing that such permission was meant as a denial of the expressly-conferred right to lease and transfer.

By the act of February, 1870, the company is "empowered to enter into contracts with corporations of this or any other State for the leasing, or hiring and transfer to them, or any of them, of their railway cars and other personal property."

Under another act of the same legislature, passed eight days later, to wit, on the seventeenth day of February, 1870, Purdon's Dig. 1441, all the leases of railroads in Pennsylvania have been made. The language of its grant was "to lease or become lessees of any railroad." This is no broader than the power conferred upon the Central Transportation Company. For the construction of similar acts see *Pennsylvania Railroad Company* v. *St. Louis, Alton &c. Railroad Co.*, 118 U. S. 290, 318; *Willamette M'f'g Co.* v. *Bank of British Columbia*, 119 U. S. 191.

It was not necessary to secure the passage of the act of February, 1870, to enable the plaintiff to hire its cars to railroad corporations. The right to use, or to hire to others to use, was incidental to that to manufacture. It had been hiring its cars to railroad corporations, as is evidenced by the contracts which it assigned to the Pullman Company, ever since it had been incorporated.

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The act of 1870 conferred power to lease or hire and transfer all the cars and personal property of the plaintiff. Is it possible to confer in clearer language a more unlimited power to lease? To lease not a part, but the whole, of the assets of the company. Can we doubt that this act authorized the corporation to change its position from that of owner and possessor of its entire property into that of a lessor entitled to receive from its lessee a rental?

We can hardly believe that the decision of this court in *Railroad Co.* v. *Thomas* would have been rendered if an act of the legislature of New Jersey could have been found, approximating in liberality to the acts empowering the Central Transportation Company.

II. It did not create a monopoly, which made it void.

The Legislature of Pennsylvania authorized a lease of all the plaintiff's property to a single corporation, and, if, therefore, such a lease did create a monopoly, it was one which was legal. We do not, however, mean to confine our discussion under this head to saying this, although, as we think, it is conclusive.

It can hardly be said that a corporation having a power to manufacture cars creates a monopoly by selling or leasing such cars to another corporation, especially in a State like Pennsylvania, where it is open to any set of five persons in the Commonwealth, to file articles of association, and to become clothed with the power to manufacture as many cars as they may see fit.

In *Morrison* v. *Barclay Coal Company*, 68 Penn. St. 173, corporations which controlled, practically, all the output of coal in a large region, entered into a contract to put up prices. This did create a monopoly. It was impossible, however, for the Central Transportation Company to monopolize the manufacture of cars.

An assignment by the Central Transportation Company of the property which it possessed in 1870, created a monopoly to no greater extent than results from any assignment of a like character by a corporation or an individual. A monopoly results from a contract between persons or corporations prac-

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tically controlling the supply of an article to restrict or interfere with such supply. A monopoly can never result from an agreement between two persons or corporations, having no possible power to control a supply, to consolidate their property by a sale or lease from one to the other.

III. The lease was not void as contrary to public policy. *Leather Cloth Co.* v. *Lonsont*, L. R. 9 Eq. 345; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 409; *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 68; *Thomas* v. *Railroad Co.*, 101 U. S. 71, 83; *Fowle* v. *Park*, 131 U. S. 88; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Morse Drill Co.* v. *Morse*, 103 Mass. 73; *Davies* v. *Davies*, 36 Ch. D. 359; *Rousillon* v. *Rousillon*, 14 Ch. D. 351, 363; *Webster* v. *Buss*, 61 N. H. 40; *Hagg* v. *Darley*, 47 Law Journal (N. S.) Ch. 567; *Printing Co.* v. *Sampson*, L. R. 19 Eq. 462; *McKinnon Pen Co.* v. *Fountain Ink Co.*, 48 N. Y. Supreme Ct. 442; *Baines* v. *Geary*, 35 Ch. D. 154.

In most of the cases reported, the relief which was refused was to specifically enforce, or to recover damages for the breach of, contracts by the party who by his covenant agreed to restrain his future exertions. In these, and in all other cases, the court has struck down a covenant in unlimited restraint of trade without reason; because (1) of the right of the covenantor to earn his livelihood, and (2) of the right of the public to the exercise of his industry.

It is not necessary to protect the covenantor in a case like the present, where its livelihood is provided for by the payment of a very large rental during the whole term of the restriction.

Has the public a right in the continued conduct of its business by a corporation, such as makes it illegal for it to agree not to continue it? If it has, the remedy is by ouster, not by confiscation in favor of the covenantee.

Corporations consist of an association of individuals who contribute their capital for the furtherance of a common purpose. So far as these members are concerned, no covenant by the corporation restricts their use of their individual capital in any way it may please them. The covenant by the corporation affects only the future use of the capital which has been contributed to it. Under the laws of Pennsylvania it may

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dissolve at any time upon application to the court, without reason. If it may dissolve, why may it not agree not to continue its business, where there is no duty upon it as the condition of a privilege of which it retains the benefit, without incurring any other risk than the possible action of the court upon a writ of *quo warranto?* Certainly a corporation which is authorized to turn over by way of lease, and transfer to another corporation all its property, may agree that it will do nothing inconsistent with the lease which it is authorized to make, and thereafter it will remain under no obligation to the Commonwealth to contribute to the welfare of the community by a further investment of capital. A legislative power to lease all the property of a corporation carries with it the right to do whatever will induce a person to become the lessee, especially to agree not to do what, if done, would render the lease worthless.

IV. The contract was so executed on the first day of July, 1886, as to entitle the plaintiff to sue for the rent which fell due up to that day, even if the contract was contrary to public policy.

In *Thomas* v. *Railroad Co.*, *supra*, it was said: "It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. In regard to corporations the rule has been well laid down by Comstock, C. J., in *Parrish* v. *Wheeler*, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, with four or five years of action under it, the accounts have been adjusted and each party has received what he was entitled to by its terms."

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In *Oregon Railway and Navigation Co.* v. *Oregonian Company*, 130 U. S. 1, the suit was for a semi-annual rental, payable in advance, for a period which had only commenced to run after the property had been surrendered.

We have numerous cases in which it has been held that, after the contract has been executed, it is not competent for a corporation which has received the benefit of the execution to set up the defence of public policy, especially where it is not *ultra vires* for the corporation which sets up the defence to pay. *Woodruff* v. *Erie Railway*, 93 N. Y. 609; *Camden and Atlantic Railroad* v. *May's Landing Railroad*, 48 N. J. Law, 530; *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267; *San Antonio* v. *Mehaffy*, 96 U. S. 312, 315; *Oil Creek Railroad* v. *Pennsylvania Transportation Co.*, 83 Penn. St. 160; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62.

In the present case the suit is not for damages for an unexecuted contract, but to recover the consideration agreed to be paid for a lease of property which ended on the first day of July, 1886. If the contention of the defendant that it had a right then to terminate the lease was well founded, nothing more remained to be done by either party. It is impossible to see that the defendant lost anything by reason of the non-enforcible character, if it had such a character, of the covenant not to manufacture other cars; because after the first day of July, 1886, the plaintiff was at liberty to do what it pleased.

Until that day the Pullman Company had retained possession of all the plaintiff's property. Why was it not obliged to pay what it had agreed to pay for a consideration which was then fully performed? Why ought not that company which agreed to pay a certain sum that it had the legal right to agree to pay, be estopped from setting up against the plaintiff, which may not have had the right to covenant that it would not engage in the business of manufacturing cars, but which had not engaged in that business, and whose property had been used, the fact that it had made an illegal contract to do something which in fact it had not done? How will public policy be promoted by permitting the defendant, which has received the consideration for the contract, to ignore the compensation it agreed to pay?

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The contract, so far as concerned the covenant to pay rent up to the first of July, 1886, had been fully executed by the plaintiff. The learned judge below thought that because it had no right to bind itself not to engage in the business of manufacturing cars it ought not to recover the full rental stipulated for. To this we reply that up to the first day of July, 1886, the defendant had received the full consideration for the agreed-upon rental which it had bound itself to pay quarterly.

If the learned judge, however, was right in his theory, he forgot that on the first day of July, 1886, the defendant had tendered to the plaintiff its property and had announced the lease as ended. It was not entitled, after the termination of the lease, to object to their right because of the non-enforcibility. There should have been no allowance to it of a deduction because of this covenant, when it had never been broken and when the right to insist upon it had terminated by expiration of time.

We urge, however, beyond this, that the rental was agreed to be paid as a consideration for the delivery of certain patents, contracts and cars. The duty to pay rent from quarter to quarter resulted from the fact of such delivery. If the superadded and separate covenant by the plaintiff not to engage in the business of manufacturing cars could not be enforced, it was because of a matter of law which both parties were bound to know. Did the fact that an additional covenant was entered into, which was not legally enforcible, release the defendant from its obligation to pay the rental it had agreed to pay as a consideration for what it got? *Oregon Navigation Co.* v. *Winsor*, 20 Wall. 64; *Wallace* v. *Day*, 2 M. & W. 273.

In conclusion, we urge upon the court that the decision of the court below leaves the plaintiff in a most deplorable condition. Its contracts, which were valuable, are gone. The defendant under the lease is now in possession of all the contracts which were formerly owned by the plaintiff. It has been denied a right to recover the sum agreed to be paid in the lease because of the contract being against public policy.

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If it cannot recover upon the contract, how can it recover upon a *quantum meruit?* If it has no action at law, how can it obtain any relief in equity?

Mr. Edward S. Isham and *Mr. Wayne MacVeagh* for defendant in error.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

The principal defence in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the Circuit Court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made.

There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument.

The Circuit Court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and in case the said court *in banc* shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the Supreme Court for revision and review, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." Penn. Stats. March 11, 1836, c. 34, § 7; March 11, 1875, c. 8; 2 Purdon's Digest (11th ed.) 1362, 1363.

Under that statute, as expounded by Chief Justice Gibson, the judge can order a nonsuit, only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient

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in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. *Smyth* v. *Craig*, 3 Watts & Sergeant, 14; *Fleming* v. *Insurance Co.*, Brightly, 102; *Bournonville* v. *Goodall*, 10 Penn. St. 133.

It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. *United States* v. *Evans*, 5 Cranch, 280; *Evans* v. *Phillips*, 4 Wheat. 73; *Cossar* v. *Reed*, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. *Elmore* v. *Grymes*, 1 Pet. 469; *Strother* v. *Hutchinson*, 4 Bing. N. C. 83; *S. C.* 5 Scott, 346; 6 Dowling, 238; *Voorhees* v. *Coombs*, 4 Vroom, 482.

There are many cases in the books, in which this court has held that a court of the United States had no power to order a nonsuit without the plaintiff's acquiescence. *Elmore* v. *Grymes*, above cited; *Crane* v. *Morris*, 6 Pet. 598, 609; *Silsby* v. *Foote*, 14 How. 218; *Castle* v. *Bullard*, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. *Crane* v. *Morris* and *Castle* v. *Bullard*, above cited.

The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of this court, "rather a matter of form than of substance, except [that] in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal." *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 264.

Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence,

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the defence that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are now required by the act of Congress of June 1, 1872, c. 255, § 5, (17 Stat. 197,) reënacted in § 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the State within which the trial is had. *Sawin* v. *Kenny*, 93 U. S. 289; *Ex parte Boyd*, 105 U. S. 647; *Chateaugay Co., petitioner*, 128 U. S. 544; *Glenn* v. *Sumner*, 132 U. S. 152, 156.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon.

But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error.

It was therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defence of *ultra vires*, independently of the form in which that question was presented and disposed of.

Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation; there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered within the last twelve years by the late Mr. Justice Miller, afford satisfactory guides and ample illustrations.

The earliest case in this court, which touches the subject, is *York & Maryland Railroad* v. *Winans*, decided at December term, 1854, in which a railroad corporation unsuccessfully tried to escape liability for an unlicensed use of the plaintiff's patent in cars run over its road, upon the ground that the cars were

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constructed, owned and used by another corporation under a contract with the defendant. Mr. Justice Campbell delivering judgment said: "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature." 17 How. 30, 39.

In *Pearce* v. *Madison & Indianapolis Railroad*, at December term, 1858, it was adjudged that two corporations, chartered by the State of Indiana to construct and manage distinct, though connecting railroads, had no power to consolidate themselves into one corporation, or to establish a connecting steamboat line on the Ohio River, and therefore were not liable to be sued upon a promissory note which they had given in payment for a steamboat. The same justice, in delivering the opinion of the court, stated the reasons for the decision as follows: "The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their

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powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporations shall transcend their authority." 21 How. 441–443.

In *Zabriskie* v. *Cleveland &c. Railroad*, at December term, 1859, this court, again speaking by the same justice, while affirming and acting on the principle that a corporation may be bound by the conduct and representations of its directors in "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard," took the precaution to observe: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court." 23 How. 381, 398.

In *Thomas* v. *Railroad Co.*, 101 U. S. 71, decided at October term, 1879, it was adjudged that a lease for twenty years by a railroad corporation of its railroad, rolling stock and franchises, in consideration of being paid one half of the gross sums collected from the operation of the road by the lessees during the term, and reserving to the lessor a right to terminate the lease and retake possession of the road at any time, paying to the lessees the value of the unexpired term, was void; and that the corporation, upon terminating the lease and resuming possession when the lessees had been in possession five years, and the accounts of the parties for those years having been adjusted and paid, was not liable to an action by the lessees to recover the value of the unexpired term; and Mr. Justice Miller, in the course of delivering judgment, said:

"The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: 'That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corpora-

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tion, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight or passengers, and to enforce the fulfilment of such contracts.' This is no more than saying 'you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods, received from railroad or other carrying companies, should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease or transfer to others the entire road, and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies." 101 U. S. 80. "The authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it, and with the lease to part with all its powers to another company or to individuals." 101 U. S. 81.

"The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains, that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." 101 U. S. 82.

"There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant,

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any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." 101 U. S. 83.

It was also held in that case that the lease was not made valid by a subsequent act of the legislature, regulating the rates of fares and freights to be charged by "the directors, lessees or agents of said railroad;" the court saying: "It is not by such an incidental use of the word 'lessees' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State." 101 U. S. 85.

In *Branch* v. *Jesup*, Mr. Justice Bradley delivering judgment said: "Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them." And a lease from one railroad corporation to another was upheld in that case, only because the lessor had by its charter express authority, not only to purchase, hold and convey property, real and personal, and to connect its road with any other road, but also to incorporate its stock with that of any other company, which, it was observed, "contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power

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of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply." 106 U. S. 468, 478, 479.

In *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, the same principles were reaffirmed; and the court, again speaking by Mr. Justice Miller, after referring to some of the previous decisions on the subject in this and other courts, stated, "as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers; nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

In that case it was held that a lease for ninety-nine years of a railroad in Illinois and Indiana from a railroad corporation of Illinois to a railroad corporation of Indiana, whose road connected with the road leased, was within the authority conferred on the lessor by the statute of Illinois, which empowered all railroad corporations of that State to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof;" yet was unlawful and void, because beyond the authority conferred upon the lessee by the statute of Indiana, empowering any railroad corporation of that State, whose road connected with a railroad in an adjoining State, "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper;" the court saying that it could not "see in this provision any authority to make

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contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk." 118 U. S. 290, 309, 312, 630.

In another case, decided about the same time, the same justice, in delivering an opinion by which a corporation was held to be liable for a tort done by its agents in the course of its business and of their employment, although in excess of its powers, observed: "The question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practised on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement." *Salt Lake City* v. *Hollister*, 118 U. S. 256, 263.

In *Willamette Co.* v. *Bank of British Columbia*, 119 U. S. 191, cited for the plaintiff, a corporation chartered "for the purpose of creating and improving water power and privileges," and authorized to bring water from a river, was also expressly authorized by its charter to "use, rent or sell" "the exclusive right to the hydraulic power and privileges created by the water" so taken, and for that reason only was held by this court, speaking by the same justice, to have the power to mortgage such right, power and privileges.

In *Green Bay & Minnesota Railroad* v. *Union Steamboat Co.*, 107 U. S. 98, and in *Pittsburgh &c. Railway* v. *Keokuk & Hamilton Bridge*, 131 U. S. 371, 384, the general doctrine of *ultra vires*, as established by earlier decisions, was affirmed; and a railroad corporation was held to have the power, for the purpose of securing a continuous line of transportation of which its road formed part, to make a contract with a steamboat company, or with a company chartered to construct a railway bridge or viaduct, because the charter of the particular

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railroad corporation, read in connection with the general laws applicable to it, clearly manifested the intention of the legislature to confer upon it that power.

In *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1, it was held that a general law of Oregon, authorizing companies to organize themselves by written articles of association filed with the Secretary of State for "any lawful enterprise, business, pursuit or occupation" specified in the articles, including "making or constructing any railroad," and "to purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation," did not authorize a railroad corporation to be incorporated, either for leasing its railroad to another corporation, or for taking leases from other corporations of their roads, although these objects were included in its articles of association; and therefore that, without further and express authority from the legislature, a lease for ninety-six years from one railroad corporation of its whole road and franchises to another such corporation was utterly void, and would not sustain an action by the lessor against the lessee to recover the rent stipulated in the lease.

It was also held in that case, in accordance with the decision in *Thomas* v. *Railroad Co.*, that no authority to make such a lease could be implied from a special act passed by the Oregon legislature before the lease, granting to the plaintiff corporation rights, privileges and easements, for wharves, stations and tracks, in certain public grounds and streets; with a proviso that said corporation "or its assigns" should have no power to sell, convey or assign the rights so granted to any person or corporation, save only with and as part of its railway; and the reasons for so holding appear in the following extracts from the opinion of the court, delivered by Mr. Justice Miller:

"One of the most important powers with which a corporation can be invested is the right to sell out its whole property together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most

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important which could be given it, and this idea would impress itself upon the legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word 'assigns,' a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified." 130 U. S. 30.

"The object of the legislature in making the proviso to that statute was to make sure that the grant given to the Oregonian Company of terminal facilities, as they are called, with the right to wharves, depots and access to the river for the use of the road, should never be separated by sale, assignment or otherwise from the road itself, and that into whosesoever hands the road went should also go the rights, powers and privileges conveyed by the grant." 130 U. S. 32.

It was further held that a provision of the general laws of Oregon, authorizing any corporation, by a vote of a majority of its stockholders, to dissolve itself, and thereupon to settle its business, dispose of its property and divide its capital stock, did not confer upon it any authority, while continuing in existence, to dispose of by conveyance or lease its road and its corporate powers and franchises. 130 U. S. 34, 35.

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. A cor-

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poration cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544–548; *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66, 88, 89; *Slidell* v. *Grandjean*, 111 U. S. 412, 437, 438. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 26, 27.

In the case at bar, the plaintiff was originally incorporated for twenty years from December 26, 1862, with a capital stock of $200,000, by articles of association, called a certificate or

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charter, under general laws of Pennsylvania. It is not without significance, that those laws required its stock, property and affairs to be managed by a board of directors, a majority of whom should be stockholders therein, and citizens of the State; and forbade it to use any part of its capital stock in the purchase of stock in any other corporation. Those laws related to manufacturing companies only. But the purpose of its incorporation, as stated in that charter, was "the transportation of passengers in railroad cars constructed and to be owned by the said company" under certain patents. And, as appears by the recitals in the indenture sued on, the plaintiff carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting those cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers.

The validity of the plaintiff's incorporation, as well as its power to make that indenture, however, depends not solely upon the original charter and the general laws under which it came into existence, but mainly upon a special act of the legislature of Pennsylvania of February 9, 1870. By this act, the validity of the charter for the object therein named was clearly recognized; the charter was extended for ninety-nine years, nearly fivefold the period for which the corporation was or could have been formed under general laws; and the corporation was expressly empowered to double its capital stock, and "to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property."

The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co.* v. *North American Oil Co.*, 66 Penn. St. 375; *Treadwell* v. *Salisbury Manuf. Co.*, 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and was charged with the

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duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *York & Maryland Railroad* v. *Winans*, 17 How. 30, 39; *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

The evident purpose of the legislature, in passing the statute of 1870, was to enable the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform those duties, is so inconsistent with that purpose, that it cannot be implied, without much clearer expressions of the legislative will looking towards that end, than are to be found in this statute.

The provision of this statute, by which the plaintiff is empowered to contract with other corporations "for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to "lease" or "hire" (which are equivalent words) to other corporations in the regular course of its business, and to "transfer" under such leasing or hiring, its "railway cars," and "other personal property," either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the

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plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words "personal property" in their widest sense, including not only goods and chattels, but moneys, credits and rights of action. In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public.

By the contract between these parties, as expressed in the indenture sued on, are transferred all cars already constructed, all existing contracts with railroad companies for running cars, all existing patent rights under which other cars might be constructed, and all other personal property, moneys, credits and rights of action of the plaintiff. But after the cars and the railroad contracts may have ceased to exist, and after all those patent rights must have expired, the indenture is still to continue in force for the full term of ninety-nine years, unless sooner terminated as therein provided. In addition to all this, the plaintiff covenants, in the most express and positive terms, never to "engage in the business of manufacturing, using or hiring sleeping cars" while the indenture remains in force. In short, the plaintiff not only parts with all its means of carrying on the business, and of performing the duty, for which it had been chartered, of transporting passengers and making and letting cars to transport them in; but it undertakes to transfer, for ninety-nine years, nearly coextensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation; and to continue in existence, during that period, for no other purpose than that of receiving, from time to time, from the other corporation, the stipulated rent or compensation, and of making dividends out of the moneys so received.

Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its as-

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sumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.

The necessary conclusion from these premises is, that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public.

There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy. Of the cases cited by the plaintiff upon this point, those which have most resemblance to the present case are quite distinguishable.

A covenant by the assignor of letters patent for an invention, that he will not himself make, use or sell the patented article, is undoubtedly valid, because the act of Congress which creates the monopoly expressly authorizes it to be assigned as a whole. Rev. Stat. §§ 4884, 4898; *Gayler* v. *Wilder*, 10 How. 477, 494; *Morse Co.* v. *Morse*, 103 Mass. 73. But this plaintiff's transfer and covenant, as we have seen, cover much more than patent rights, and are to continue in force long after the patent rights assigned must have expired.

Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used. *Fowle* v. *Park*, 131 U. S. 88, 97; *Vickery* v. *Welch*, 19 Pick. 523, 527; *Peabody* v. *Norfolk*, 98 Mass. 452, 460.

A contract of a carrier, whether an individual or a corpora-

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tion, not to carry passengers or goods over a particular route, may be reasonable and valid. *Peirce* v. *Fuller*, 8 Mass. 223; *Palmer* v. *Stebbins*, 3 Pick. 188; *Leslie* v. *Lorillard*, 110 N. Y. 519. But a contract by which a corporation, chartered to perform the duties of a common carrier, or any other duties to the public, agrees that it will not perform those duties at all, anywhere, for ninety-nine years, is clearly unreasonable and void. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Gibbs* v. *Baltimore Gas Co.* 130 U. S. 396, 408–410.

This case strikingly illustrates several of the obvious considerations for holding contracts in restraint of trade to be unreasonable and void, as compactly and forcibly stated by Mr. Justice Morton in the leading case of *Alger* v. *Thacher:* "They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves." "They prevent competition and enhance prices." "They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market." 19 Pick. 51, 54.

But this objection, as applied to the facts of this case, so closely connects itself with the objection more distinctly pleaded, and already discussed at length, that it requires no further separate consideration.

The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also *ultra vires* of the defendant, because, in order to bind either party, it must be within the corporate powers of both. *Thomas* v. *Railroad Co.*, *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, and *Oregon Railway* v. *Oregonian Railway*, above cited.

It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defence

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to this action to recover the compensation agreed on for that period.

But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court.

The passages cited by the plaintiff from *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267, and *San Antonio* v. *Mehaffy*, 96 U. S. 312, 315, are no more than a passing remark that "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong," and a repetition, in substance, of the same remark, adding "if such a result can be avoided."

In *Thomas* v. *Railroad Co.*, already cited, Mr. Justice Miller, while admitting in general terms that "in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the property or the money so transferred," and that "the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it," yet in the same connection, and in the most emphatic words, said that in the case before the court, of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty, a duty both to its stockholders and to the public, to rescind and abandon the contract at the earliest moment, and the performance of that duty, though delayed for several years, was a rightful act when done, and could give the other party no right of action; and that to hold otherwise would be "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." 101 U. S. 86.

In an earlier part of the same opinion, and again in *Oregon Railway* v. *Oregonian Railway*, he referred with approval to the decision of the House of Lords in *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653, by which, as he

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observed, "the broad doctrine was established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." 101 U. S. 83; 130 U. S. 22.

In *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, after one railroad corporation had purchased of two others their connecting railroads and their franchises, a receiver had been appointed of all its property, including the three railroads, and, under the direction of the court, and without objection by any of the parties interested, had for years administered the whole as a unit, and incurred expenses and issued certificates accordingly. It was held that the holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of certificates issued by the receiver for necessary and proper expenses of the whole line; and this court, as declared in its opinion delivered by Mr. Justice Blatchford, rested this conclusion "on the principle that nonaction on the part of the bondholders and their trustee, which allowed the court and the receivers to go on during the entire litigation, contracting debts in respect to the whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests, as to expenditures and benefits, in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel." 117 U. S. 467–469. The court, in that case, in no way maintained any suit on the contract supposed to be unlawful; but simply refused to set it aside at the demand of parties, by reason of whose silence, and omission to seasonably interpose any objection, it had been acted upon as valid throughout a long course of judicial proceedings.

The distinction is clearly brought out in *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, above cited, in which it was

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argued, substantially as in the present case, that, although the contract of lease might be void, so that no action could originally have been maintained upon it, yet there had been for years such performance of it, in the use, possession and control by the defendants of the plaintiff's road and franchise, that they could not now be permitted to repudiate or abandon it; and that the case came within that class in which it had been held that, where a contract has been so far executed that property has passed and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract. In answering that objection, Mr. Justice Miller, speaking for the court, said: "Undoubtedly there are such decisions in courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." And whether, in the case then before the court, the lessee might be liable to the lessor, as on a *quantum meruit*, for the use of its road, was not decided, because not presented. 118 U. S. 316–318.

In *Salt Lake City* v. *Hollister*, above cited, it was said that, in cases of contracts upon which corporations could not be sued because they were *ultra vires*, "the courts have gone a long way to enable parties, who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." 118 U. S. 263.

The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice Miller in support of the proposition just quoted, in which municipal corporations, having received money or property under contracts so far beyond their powers as not to be capa-

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ble of being enforced or sued on according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received.

Thus, in *Hitchcock* v. *Galveston*, 96 U. S. 341, 350, where a city was sued for damages for putting an end to a contract with the plaintiffs for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which it was beyond its powers to issue, it was decided that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract, Mr. Justice Strong, in behalf of the court, saying: "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

So in *Louisiana* v. *Wood*, 102 U. S. 294, 299, a city, which had received money for bonds issued by it without authority and at an illegal rate of interest and purchased by the plaintiff, was held liable, not on any contract of purchase, nor on any express contract whatever, but on a contract implied from its receipt of the money, Chief Justice Waite saying: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again, in *Parkersburg* v. *Brown*, 106 U. S. 487, 503, where individuals, in consideration of bonds issued to them by a city for a purpose beyond its powers, executed to the city a trust deed, in the nature of a mortgage, to secure the payment of the bonds and interest, it was held that the bonds could not

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be enforced against the city, but that the mortgagors had a right to reclaim the property and to demand an account of the city; and Mr. Justice Blatchford, in delivering judgment, said: "The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. There was no illegality in the mere putting of the property by the O'Briens [the mortgagors] in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

The case of *Chapman* v. *Douglas County*, in which the opinion was delivered by Mr. Justice Matthews, is to the same effect. 107 U. S. 348, 355 *& seq.*

In *Pittsburgh &c. Railway* v. *Keokuk & Hamilton Bridge*, it was stated, as the result of the previous cases in this court, that "a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389.

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract can-

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not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it.

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

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The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 317.

Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for.

Judgment affirmed.

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.

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PULLMAN'S PALACE CAR COMPANY *v.* CENTRAL TRANSPORTATION COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 20. Argued January 28, 29, 1890. — Decided March 2, 1891.

Under an indenture in the nature of a lease which includes railway sleeping cars and written contracts for letting them to certain railroad companies, and which provides that if the revenue derived from such contracts shall, by reason of the refusal of any of the railroad companies to permit the cars to be run over their lines of road, fall below the sum agreed in the indenture to be paid quarterly by way of annual rent, the lessee "shall have the right either to declare this contract null and void and surrender" to the lessor the property leased, "or shall and will pay in like manner, in lieu of said sum, such sum or share of the net revenue from the remaining lines of the roads as the parties hereto may at that time agree upon," the lessee, if he makes no election, in case of the revenue, by reason of such refusal of the railroad companies, falling below the sum first mentioned, is no longer liable for that sum, but only for such share of the net revenue from remaining railroads as the parties may at that time agree upon, and, if they do not agree, for a sum to be assessed by the jury in the nature of a *quantum meruit*, not exceeding the whole of such net revenue.

THE case is stated in the opinion.

Mr. Edward S. Isham and *Mr. Wayne McVeagh* for plaintiff in error.

Mr. John G. Johnson for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action of covenant, brought July 30, 1885, by the Central Transportation Company against Pullman's Palace Car Company to recover the rent or sum of $132,000, due for the first two quarters of the year 1885, under the indenture of lease of February 17, 1870, counted on in the other case between the same parties, argued at the same time, and just decided,

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ante, 24. The plaintiff obtained a verdict and judgment for $119,729.13; and the defendant sued out this writ of error.

In the present action, which was tried before the other was brought, the objection that the contract sued on was *ultra vires* was not pleaded, nor in any way brought to the notice of the court below. The defendant, therefore, is not entitled to avail itself of it upon this writ of error. *Bell* v. *Bruen*, 1 How. 69; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Klein* v. *Russell*, 19 Wall. 433; *Badger* v. *Ranlett*, 106 U. S. 255; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 468. Whether, under these circumstances, this court, of its own motion, might take this objection need not be considered, because upon another ground the verdict must be set aside and a new trial ordered.

The defendant pleaded only two pleas, the first of which was simply "covenants performed, *absque hoc*," (according to the form used in Pennsylvania,) which put in issue the performance of the defendant's covenants, as well as the performance of the plaintiff's covenants, as alleged in the declaration, but not the execution or the validity of the contract sued on. *Wilkinson* v. *Pittsburg Turnpike Co.*, 6 Penn. St. 398; *Farmers' & Mechanics' Turnpike Co.* v. *McCullough*, 25 Penn. St. 303.

The other plea set up an agreement between the parties, dated February 27, 1885, which recited the eighth covenant in the original indenture of lease, in these words:

"8th. In the event that any of the railroad companies mentioned in the assigned contracts shall at any time during this agreement refuse to permit the cars of the second party to be run on and over their respective lines of roads, so that, by reason of such prevention or refusal, the profits, income and revenue derived from and under any other remaining contracts with other and remaining railroad companies mentioned in the assigned contracts shall fall below the sum of two hundred and sixty-four thousand dollars, then, and in that event, said second party shall have the right either to declare this contract null and void and surrender to said first party the said hereinbefore demised property, or shall and will pay, in like manner, in lieu of the said sum of two hundred and sixty-

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four thousand dollars, such sum or share of the net revenue from the remaining lines of the roads as the parties hereto may at that time agree upon."

The agreement pleaded also recited the refusal of some of the railroad companies therein mentioned to permit the leased cars to run over their roads, leaving only certain lines over which the defendant was still running cars under a contract with the Pennsylvania Railroad Company, which expired January 27, 1885; and that the defendant was negotiating a new contract with that company, the annual income and revenue to be derived from and under which, applicable to the payment of rent under the indenture of lease, would fall much below the sum of $264,000, the rent agreed on in that indenture; and that it had become necessary to modify that indenture in respect to the rent and otherwise.

By this agreement, in consideration of the premises, it was agreed that an annual rent of $66,000, in equally quarterly payments, together with one-fourth of the taxes to be paid by the plaintiff to the State of Pennsylvania, should be paid by the defendant to the plaintiff, in lieu and in stead of the aforesaid sum of $264,000; and other stipulations were made in modification of the original indenture.

The plaintiff filed a replication, denying the making of the agreement pleaded.

At the trial, in June, 1886, the plaintiff gave in evidence its charter and the indenture counted on, and proved that it had received only $33,000 for rent during the six months ending July 1, 1885.

The defendant gave in evidence the agreement pleaded, which was admitted to be under the seals of the two corporations, and signed by the president and secretary of each in its behalf, and to have been executed pursuant to a vote of the plaintiff's board of directors.

The defendant offered other evidence tending to show that the contracts with all the railroad companies had expired, and that those companies had refused to renew them, except on terms less favorable to the defendant, and that by reason thereof the annual income and revenue derived from and

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under the contracts remaining in force fell much below the sum of $264,000. This evidence was offered, in connection with the recitals in the agreement of February 27, 1885, for the purpose of supporting one branch of the defence, namely, that if that agreement did not govern the extent of the defendant's liability, yet the plaintiff could recover only a sum equal to the net revenue derived from such contracts. Upon the plaintiff's objection this evidence was excluded, and the defendant excepted to the ruling.

The ground of that ruling appears to have been that there was no evidence to justify the jury in finding "an election, prior to the commencement of this suit, either to return the property rented and held, or to pay over the net earnings referred to in the contract, in case a new contract was not agreed upon by the parties."

The court afterwards submitted the case to the jury upon two questions, (concerning which much evidence had been introduced by both parties,) whether the plaintiff's directors had authority from the stockholders to make on its behalf the agreement of February 27, 1885; and whether the delivery of that agreement was on the understanding that it should take effect immediately, or that it should be conditional upon the approval of the stockholders; and instructed the jury that to warrant a verdict for the defendant both these questions must be answered in the defendant's favor.

But that agreement was admitted to have been executed and delivered in behalf of the plaintiff corporation, in due form, by the proper officers, and under a vote of the board of directors. Even if, for want of assent of the stockholders, it did not bind the corporation as fixing a new rate of compensation, it was competent evidence against the corporation that the contracts with the railroad companies had been terminated, and the revenue derived from such contracts thereby diminished. The rulings and instructions which denied it that effect, and excluded from the consideration of the jury other evidence of those facts, rest upon a misconception of the true scope and meaning of the eighth covenant in the original indenture of lease, above quoted.

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The manifest purpose and meaning of this covenant are that, in the event supposed, of any of the railroad companies refusing to permit the defendant's cars to be run over their roads, and of the defendant's income and revenue thereby falling below the annual sum or rent of $264,000, the defendant shall not continue to be liable to pay that rent or sum, but may elect to declare the lease void and to surrender to the plaintiff the leased property, or, if it does not elect to annul the lease, shall pay, in like manner as, and in lieu of, the said sum of $264,000, such sum or share of the net revenue from the remaining lines of road as the parties may at that time agree upon. The alternative required of the defendant is not that the defendant shall elect to avoid the lease, or shall elect to pay a share of the net revenue; but the alternative is to declare the lease void, or to pay a share of the net revenue. The only affirmative election contemplated, as affecting the extent of the defendant's liability, is an election to declare the lease void. If the defendant, in the event supposed, elects to declare the lease void, it is no longer liable for any rent whatever. If it does not elect to declare the lease void, it is no longer liable for the original rent, but, by the express terms of the covenant, and without any further act or election on its part, it is bound to pay such sum or share of the net revenue from remaining railroads as the parties may at that time agree upon. If the parties do not agree upon that sum or share, the sum which the defendant shall pay must, of course, as in all like cases, be assessed by the jury, in the nature of a *quantum meruit*, depending upon the benefits received by the defendant, and cannot possibly exceed the whole of the net revenue received by the defendant from the remaining railroad contracts.

The erroneous exclusion of the evidence offered by the defendant, and above stated, directly affecting the amount which the plaintiff by the terms of the original lease was entitled to recover, requires the verdict to be set aside and a new trial ordered; and there is no occasion to consider whether there was any error in the rulings and instructions of the court concerning the questions afterwards submitted to the jury, because

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upon another trial the case may be presented in a different aspect.

Judgment reversed, and case remanded, with directions to set aside the verdict and to order a new trial.

MR. JUSTICE BROWN, not having been a member of the court when this case was argued, took no part in its decision.

LOGAN COUNTY NATIONAL BANK v. TOWNSEND.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 170. Submitted January 22, 1891. — Decided March 2, 1891.

T. sold to a national bank, for sixty-eight cents on the dollar, $12,800 of the bonds of a municipal corporation issued in aid of a railroad under an agreement that the bank would, upon demand, replace them to him at the same or a less price. Subsequently, he demanded compliance with this agreement, but the bank refused. In an action brought against the bank in a state court to recover the difference between the amount it paid for the bonds, and their value at the time they were demanded, the defence in part was that the bank had no authority, under its charter and the national banking act, to make the alleged agreement and purchase, and, by reason of such want of authority, could not be held liable to the plaintiff in any amount or upon any ground whatever. This defence was overruled in the state courts of original and appellate jurisdiction. *Held*,

(1) That this court had jurisdiction to review the judgment, so far as it involved the question whether the bank was exempted by the act of Congress or by its charter, from liability to account to the plaintiff for the value of the bonds which the jury found were purchased by it from the plaintiff, to be returned to him on demand at the same or a less price;

(2) The national banking act is an enabling act for associations organized under it, and one cannot rightfully exercise any powers except those expressly granted, or such incidental powers as are necessary to carry on the business for which it was established;

(3) But that act does not give a national bank an absolute right to retain bonds coming into its possession, by purchase, under a contract which it was without legal authority to make. Although the bank is not bound to surrender possession of them, until reimbursed the full amount due to it, and may hold them as security for the return

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of the consideration paid, yet when such amount is returned, or tendered back to it and the return of the bonds demanded, its authority to retain them no longer exists; and, from the time of such demand and its refusal to surrender the bonds to the vendor or owner, it becomes liable for their value upon grounds of implied contract, apart from the original agreement under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase.

THE federal question is stated in the opinion.

Mr. Wilbur F. Browder for plaintiff in error.

Mr. John Feland for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a judgment of the Court of Appeals of Kentucky, affirming a judgment of the Circuit Court for Logan County, in that Commonwealth, in favor of the defendant in error against the Logan County National Bank, a banking association organized under the act of Congress.

The petition states that in June, 1879, the plaintiff Townsend sold to the bank, through Hugh Barclay, Jr., its cashier, $12,800 of the bonds of Logan County, Kentucky, issued in aid of the Owensboro and Russellville Railroad, with six months' interest accrued thereon, for the consideration of sixty-eight and one-half cents on the dollar, and of the promise and agreement of the bank that it would, upon plaintiff's demand, replace the bonds to him, at the same price, or less; that, relying upon such promise and agreement, he made the sale to the bank, and it refused to comply with its promise and agreement, although requested to do so. It also alleges that, at the commencement of the action, as well as at the time of plaintiff's demand, the bonds were worth, dollar for dollar, par and accrued interest; and that by reason of the refusal of the bank to comply with its promise and agreement the plaintiff has sustained damages in the sum of $4032, the difference between the price paid by it for the bonds and

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their par value, and $384, the amount of six months' accrued interest. The prayer of the petition is for a judgment for damages in the sum of $4416, and costs, and all proper relief.

The defendant filed a general demurrer as well as an answer to the petition. The answer contains five paragraphs. In the first paragraph, it denies that the plaintiff at any time sold to it $12,800 or any other amount of the bonds of Logan County; in the second, that it ever promised or agreed with the plaintiff that it would replace any bonds sold by him, at any price, on demand or at any time; and in the third, that he ever sold the bonds to its cashier for and on its account. It avers in the fourth paragraph that, in June, 1879, and before and after, Barclay was engaged on his own account in an effort to depress the value of the bonds, and to that end endeavored to induce the Logan County court, composed of the county judge and justices of the peace, to refuse to levy a tax to pay interest on them; that the plaintiff then and there owned the bonds in question; that he and Barclay, in furtherance of their personal ends, conspired to prevent a levy, agreeing that plaintiff should use his personal influence with one of the justices to prevent him from ruling in favor of one, and should allow Barclay to sell the bonds, with bonds owned and controlled by him, at a price determined on; that Barclay was to guarantee, and did guarantee, that, as a result of such sale, the value of the bonds of the county would be reduced, so that the plaintiff could buy the same amount at a price less than that at which Barclay was to sell the plaintiff's bonds; that said bonds were reduced in value, by or after their sale, far below the agreed price, so that plaintiff could at any time during the succeeding month have purchased the same amount at much less than he received for those sold for him by Barclay; that Barclay deposited the proceeds of the bonds in the defendant's bank to the plaintiff's credit, and the entire amount thereof was paid out on the plaintiff's checks; and that defendant was in no way connected with the transaction, otherwise than that, Barclay having deposited such proceeds in the bank, it paid them to the plaintiff.

It is averred in the fifth paragraph of the answer that

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Barclay had no authority, right or power to make for or on account of defendant the contract set out in the petition; that defendant had itself no right, power or authority to make it; and that it was a mere gambling transaction, a mere dealing in and betting upon the future value of the bonds, and unauthorized by the defendant's charter or by law.

The general demurrer to the petition was overruled. The plaintiff filed a demurrer to the fourth and fifth paragraphs of the answer, which was overruled as to the former and sustained as to the latter.

The plaintiff filed a reply to the third and fourth paragraphs of the answer, denying all the allegations of each, and charged that Barclay was engaged in June, 1879, and after that time, in an effort to depress the value of bonds, not on his own account, but as cashier and director of the bank, with its knowledge and consent, the bank endeavoring to enrich itself by depressing the value of the bonds of the county. To this reply the bank filed a rejoinder.

The jury returned a general verdict for the plaintiff, and also made a special finding in answer to specific questions. In response to the question, "Did Townsend sell the bonds to the defendant bank or to Hugh Barclay, Jr.," the jury answered, "To defendant bank;" and to the question "What was the contract made at date of sale," the answer was, "That defendant would replace the bonds to plaintiff at the price paid at that time or less."

Among other instructions given to the jury for the plaintiff was the following: "The court instructs the jury that if they believe from a preponderance of the proof that the plaintiff Townsend sold to the defendant, the Logan County National Bank, the bonds mentioned in the petition, and the defendant agreed and promised on demand to return the bonds to the plaintiff at the price paid, or less, and upon demand refused to do so, they must find for the plaintiff the difference between the price paid and the value of the bonds at the time the demand was made." The court refused to give the following instruction asked by the bank: "That the defendant is a national banking association, capable of exercising only such

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powers as are expressly or impliedly conferred upon it by its act of incorporation, and that the power to buy and sell municipal bonds for purposes of speculation, or to engage in the purchase or sale of such securities for the purpose of manipulating or controlling their market value, is not conferred upon the defendant bank by the provisions of its charter; and that if the jury believe from the evidence that the cashier Barclay paid Townsend the full market value for his bonds, and bought them for the sole purpose of enabling him or the bank to manipulate or control the price of said bonds in the market for speculative purposes, they must find for the defendant, provided that they shall believe that the plaintiff at the time knew that the bonds were to be used for such purposes." Other instructions were given and refused, but none of them distinctly involved the question of the liability of the defendant to the plaintiff under its charter and the act of Congress relating to national banking institutions.

The Court of Appeals of Kentucky thus disposed of that question: "The last ground is that the contract is *ultra vires* the corporate authority of the bank, in direct violation of its charter, and, consequently, is not such an obligation as will charge the bank or make it to any extent, either in law or conscience, liable in damages or otherwise for breach of the conditions. It seems to us that if the proposition be conceded it would not avail appellant, for if it had no authority under its charter to purchase the bonds it cannot, in justice and conscience, refuse to abide by the judgment in this case, which involves nothing more than the return of the bonds and receipt of what it paid for them. To do less cannot be justified without permitting it to profit by its own wrong in violating the law of Congress under which it exists. Probably according to a fair construction of the national bank act, the power is not expressly given to appellant to purchase and deal in bonds of the character in question; but neither is it expressly prohibited by the act to do so, and there is a proper and well recognized difference between 'the case of an engagement made by a corporation to do an act expressly prohibited by its charter or some other law and a

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case where legislative power to do the act has not been granted.' See *Hitchcock* v. *Galveston*, 96 U. S. 341, and numerous authorities there cited. In that case the following from the *State Board of Agriculture* v. *The Citizens' Street Railway Co.*, 47 Indiana, 407, was quoted with approval: 'Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise, and in execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract.' If the special findings of the jury in this case be taken as true, there needs no argument to show that the rule thus laid down applies to the contract we are considering, and to adopt the opposite of that rule would invite a disregard of the provisions of the national bank act, as well as fraud and bad faith towards those dealing with a corporation existing under it."

Upon the question raised by the defendant in error as to the jurisdiction of this court, it is sufficient to say that the fifth paragraph of the answer, to which a demurrer was sustained, and one of the defendant's requests for instructions, which was refused, proceeded alike upon the ground that the bank was forbidden by the national banking act to make the contract or agreement set out in the petition, and, consequently, that it was exempted from liability to the plaintiff upon any ground whatever. The exemption or immunity thus specially set up in the court of original jurisdiction, and reasserted in the Court of Appeals of Kentucky, having been denied by the judgment, the authority of this court to reexamine that judgment, so far as it determines that no such exemption or immunity as that claimed by the bank, under the act of Congress, exists, is entirely clear. That the Court of Appeals of Kentucky may have held the bank liable independently of the question whether the act of Congress forbade or did not forbid a national bank from making such a contract as the petition recites, does not show a want of jurisdiction in this court; for the defendant's contention was, and

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is, that consistently with the act of Congress it cannot be held liable to the plaintiff upon any ground. So that the judgment necessarily determined, adversely to the bank, that it had no such exemption or immunity as it asserts in virtue of the national banking act. It is not a case — if the bank be right in its contention — in which the judgment can rest upon some ground of general law, adverted to by the state court, and sufficiently broad to support it without reference to the act of Congress as interpreted by the bank. We must, therefore, inquire whether the act of Congress protects the bank from liability to the plaintiff in any aspect in which his claim may be regarded.

Whether the agreement set out in the petition for the sale of the plaintiff's bonds was made by the cashier of the bank upon his individual account, or for the bank, is not a question before us. That was conclusively determined by the finding of the jury. We have no authority to review the finding upon that point, and must assume, in conformity with the finding, that the bonds were sold by Townsend to the bank, at a given price, and that the bank agreed to replace them to him at the same or a less price, upon demand.

It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established. The statute declares that a national banking institution shall have power "to exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions" of Title 62 of the Revised Statutes.

Now, the contention of the bank is that the purchase of the

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bonds in question, at a named price, under an agreement to replace them to the plaintiff at the same or a less price, upon the demand of the plaintiff, was not banking business in any proper or legitimate sense; certainly not of the kind it was authorized by the statute to conduct. In the view we take of this case, it is unnecessary to determine that question, or to discuss the authorities cited to show that such a contract as the one set out in the petition is not embraced by any of the clauses of the statute specifying the different modes by which a national bank may carry on the business of banking. If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff, on demand, the question would still remain, whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price.

It would seem, upon defendant's theory of its powers, to be too clear to admit of dispute that the act of Congress does not give a national bank an absolute right to retain bonds coming into its possession, by purchase, under a contract which it was without authority to make. True, it is not under a duty to surrender possession until reimbursed the full amount due to it; it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power, under the statute, to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract — and we are assuming, for the purposes of this case, that it may be — it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the

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bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. "The obligation to do justice," this court said in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, "rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation." "This," it was further said, "is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way." Upon this obligation to do justice rests the decision in *Louisiana* v. *Wood*, 102 U. S. 294, 298, 299, where this court held a municipal corporation liable to an action for money received on bonds issued by it, and which, being issued without authority of law, were invalid. The money it got was paid to it in the belief that the bonds were valid obligations of the corporation, and, therefore, was paid by mistake. After citing *Moses* v. *Macferlan*, 2 Burrow, 1005, in which it was said that an action lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, and also, *Marsh* v. *Fulton County*, the court, speaking by Chief Justice Waite, said that the law implied from what was done, a contract "that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied."

So, in *Parkersburg* v. *Brown*, 106 U. S. 487, 503, involving the liability of a municipal corporation upon bonds issued in its name and secured by deed of trust given by the person to whom they were loaned, and which bonds were held to be void for want of authority to execute them — the court said: "But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such

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right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of the contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received the property for the unauthorized purpose, the value of that which it has actually received," citing *White* v. *Franklin Bank*, 22 Pick. 181; *Morville* v. *American Tract Society*, 123 Mass. 129, and *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 275. See also *Hitchcock* v. *Galveston*, 96 U. S. 341, 351; *Chapman* v. *County of Douglas*, 107 U. S. 348, 356, 357; *Salt Lake City* v. *Hollister*, 118 U. S. 256, 263; *Clark* v. *Saline County*, 9 Nebraska, 516; *Pimental* v. *San Francisco*, 21 California, 351, 362.

We have said that the bank could hold the bonds, even if obtained by it without authority of law, as security for the money advanced to the plaintiff for them. This is only an application of the principle announced by this court in several cases involving the validity of transactions by national banks. In *National Bank* v. *Matthews*, 98 U. S. 621, it appeared that a national bank loaned money upon the security of a note and a deed of trust of lands, both of which were assigned to it. The statute declared that a national banking association could loan money "on personal security," and could purchase, hold and convey real estate for certain named purposes, "and for no others," among which was not included the securing of a present loan of money by a deed of trust or mortgage on real property. The court, while assuming that the statute, by clear implication, forbade the bank from making a loan on real estate, refused to restrain the bank from enforcing the deed of trust. The decision went upon these grounds: That the bank parted with its money in good faith; that the ques-

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tion as to the violation of its charter, by taking title to real estate for purposes unauthorized by law, could be raised only by the government in a direct proceeding for that purpose; and that it was not open to the plaintiff in that suit, who had contracted with the bank, to raise any such question in order to defeat the collection of the amount loaned. If any doubt existed as to the scope of the decision in that case, it was removed by *National Bank* v. *Whitney*, 103 U. S. 99, where it was held that the right of a national bank to enforce a mortgage of real estate taken by it to secure indebtedness then existing, as well as future advances, could not be questioned by the debtor, and that a disregard by the bank of the provisions of the act of Congress upon that subject only laid the association open to proceedings by the government for exercising powers not conferred by law.

The bank having then the right to hold the bonds until reimbursed for its advances, but being bound, upon implied contract, to return them, on demand, when repudiating as illegal the agreement under which it got them, the next inquiry is as to the amount for which it may be held liable upon its refusing to surrender them to the plaintiff. In considering this question we assume that the bank had the bonds in its possession as well when this action was brought as when it declined to comply with the plaintiff's demand for the contract. It is neither alleged nor proved that it had disposed of the bonds prior to such demand. The jury found that it purchased the bonds, and, the contrary not appearing, the presumption was that it held them even at the commencement of the action. The amount found in plaintiff's favor was the difference between the price paid by the bank and the value of the bonds at the time the plaintiff demanded compliance upon its part with the alleged contract. The result is substantially the same as if the plaintiff had tendered back the amount received from the bank and demanded a return of the bonds or their value; in which case it would have been liable for the value of the bonds, at least, at the time of the demand. It is unnecessary to discuss the conflicting decisions as to the general rule defining the proper measure of damages

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where personal property is wrongfully detained. If the proof showed that the bonds were of greater value at or before the time of trial than at the time of the demand for their return, a different question would be presented. *Galigher* v. *Jones*, 129 U. S. 193, 201. In this case it appears that there was no difference in their value at those respective dates. The bank, if liable at all, is certainly liable, in this case, for the value of the bonds at the time it refused, upon demand, to restore them. It was not in default, under the alleged contract, until the plaintiff's demand for its performance; for until then its possession of the bonds was with his consent. Until demand, the plaintiff had not manifested his will to have them restored to him. The conversion occurred when the defendant repudiated all obligation to perform the contract or denied that any such contract was ever made, and yet held on to the bonds as its property. We say held on to them, because the jury has found, and we must take it to be true, that the bank, and not Barclay on his individual account, purchased them.

Our conclusion upon the whole case, so far as the questions arising in it may be reviewed by this court, is, that if the bank had no authority to purchase the bonds in question, it is yet not exempt, by reason of anything in the national banking act, from liability to the plaintiff for the difference between the price it paid for them and their value at the time it refused, upon plaintiff's demand, to comply with the contract made by it for their purchase and held on to the bonds.

Judgment affirmed.

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CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY v. PULLMAN SOUTHERN CAR COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 118. Argued December 16, 1890. — Decided March 2, 1891.

The Pullman Southern Car Company, operating drawing-room and sleeping cars, hired ten of such cars to a railroad company at the compensation of three cents per mile per car for every mile run by its cars upon the lines of the railroad company. The railroad company agreed, when requested, to repair the cars furnished under the contract as it might become necessary, and, without request, to make such repairs as were required to insure their safety, rendering bills monthly to the Pullman Company and charging for such repairs only the actual cost of the material and labor expended. The railroad company assumed responsibility for damages to the cars occasioned by "accident or casualty" while the sleeping car company assumed responsibility for loss or damage arising from defective heating apparatus or lights furnished by it. The latter company was to have the exclusive right for fifteen years to furnish drawing-room and sleeping cars on all passenger trains of the railroad company, the latter binding itself not to contract with any other party to run said class of cars on and over its lines during that period. If either party failed to keep and perform its covenants the one not in default could, upon written notice, declare the contract at an end. The railroad company had the option to terminate the contract at the end of five, eight or eleven years, upon written notice served six months before the date fixed for such termination. Two of the sleeping cars, the Louisiana and Great Northern, were entirely destroyed by fire originating "from a cause unknown;" the former at the time of the fire being on the railroad track under a depot shed used by the railroad company to store cars when not in actual transit, and the latter being in a shop belonging to the railroad company, known as the Pullman repair shop, which had been assigned to the exclusive use of the sleeping car company as a place where it could repair its own cars. This shop at the time of the fire was in the possession of the Pullman Company, the railroad employés having no access thereto. The Great Northern had been in that shop for repairs by its owner for six months before the fire, and but for the fire would have been in condition to have been again put in actual use by the railroad company on the day succeeding the fire. Both the Louisiana and the Great Northern were insured by the Pullman Company.

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After the fire the insurance companies paid $19,000 in full settlement of the loss and damage, and this action was brought by the Pullman Company against the railroad company to recover the value of the burned cars under an agreement between it and the insurance companies that the recovery should be equally divided by them. There was a verdict and judgment for the plaintiff. *Held*,

(1) The fire having "originated from a cause unknown" the losses were, within the meaning of the contract, "occasioned by accident or casualty."

(2) The collection of the insurance money did not affect or impair the right of the sleeping car company to recover the amount of the loss according to the contract with the railroad company. Upon payment of the loss, or to the extent of any payment by them on account of the loss, the insurance companies were subrogated to the rights of the insured and could in its name, or in their joint names, maintain an action against the railroad company for indemnity, if the latter was liable to the insured for the loss of the cars; this, because the liability of the railroad company was, in legal effect, first and principal, and that of the insurer secondary, not in order of time but in order of ultimate liability.

(3) The contract was not void as being in general restraint of trade or against public policy. The contract is to be interpreted in view of the condition implied by law that the sleeping car company should furnish cars not only adequate and safe but sufficient in number for the use of the public travelling over the lines of the railroad company. Such condition was not and could not have been dispensed with. Whether the agreement is so far divisible that the stipulation giving the sleeping car company exclusive rights and binding the railroad company not to make similar contracts with other parties during the stipulated term could be separated from the other provisions, *quære*.

(4) The railroad company was responsible for the loss of the Louisiana because it was in active service under the contract, and was in the possession and under the exclusive control of the railroad company for the purpose simply of being cleansed and resupplied for another trip whenever the railroad company chose to put it into service.

(5) The railroad company was not liable for the loss of the Great Northern, because that car at the time of the fire was in the exclusive possession of the sleeping car company and, when burned, was not subject to be used by, nor under the supervision of, the railroad company.

THE case is stated in the opinion.

Mr. Girault Farrar and *Mr. Thomas J. Semmes* for plaintiff in error. *Mr. James Fentress* was with him on the brief.

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Mr. George B. Eastin and *Mr. Edgar H. Farrar* for defendant in error. *Mr. Thomas F. Hargis* and *Mr. Sterling B. Toney* were with them on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the Pullman Southern Car Company to recover from the Chicago, St. Louis and New Orleans Railroad Company the damages alleged to have been sustained on account of the destruction by fire of two of the plaintiff's sleeping cars, the Great Northern and the Louisiana, while on the premises of the defendant. There was a verdict and judgment for the sum of $19,000, with interest from September 20, 1886, the date of judicial demand, at the rate of five per cent per annum until paid, with costs. The assignments of error relate entirely to instructions given on behalf of the plaintiff, and to the refusal to give instructions asked by the defendant.

The action is based upon a written agreement between these corporations, dated April 5, 1879, showing that the business of the plaintiff was to operate drawing-room and sleeping cars which it hired, under written contracts for a term of years to be used and employed on and over the lines of railway companies, receiving therefor income and revenue by the sale to passengers of seats, berths and accommodations therein; and that the defendant was desirous of availing itself of their use, on its own routes, and also of connections, by means of such drawing-room and sleeping cars, with other railroads over which the plaintiff was running its cars. In order to effect the objects of the parties it was, among other things, agreed as follows:

1. The plaintiff was to furnish drawing-room and sleeping cars "sufficient to meet the requirements of travel," on and over the defendant's railway, and such roads as the latter then or thereafter controlled as owner, lessee or otherwise; the cars so furnished to be satisfactory to the general manager or superintendent of the railroad company, and to be in part certain named cars, ten in number, among which were the Louisiana and the Great Northern, then operated on the defendant's

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lines. 2. Each of the plaintiff's cars was to be manned, at its own cost, by one or more of its employés, as might be needful for the collection of fares and the comfort of passengers; such employés to be subject to the rules and regulations established by the defendant for its own employés. 3. "In consideration of the use of the aforesaid cars" the defendant was to haul them on passenger trains on its own lines of railroad, and on passenger trains on which it might, by virtue of contracts or running arrangements with other roads, have the right to use them, "in such manner as will best accommodate passengers during the use of said cars." 4. By article sixth of the agreement, all necessary lubricating material, ice, fuel and material for lights, were to be supplied, and the washing and cleansing of the cars furnished under the contract to be done, by the defendant at its expense, which should also renew and replace, as often as necessary, links, pins, bell-cord and couplings for air-brake hose, without charge to the plaintiff. 5. The plaintiff was to keep the cars furnished under the contract in good order and repair; renew and improve them, when necessary, at its own expense; keep them up to the average standard of the best and most approved sleeping cars on any road using an equal number of cars, "excepting repairs and renewals provided for in article sixth of this agreement, and such as are made necessary by accident or casualty, it being understood that the railway company shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars arising from defective heating apparatus or lights furnished by it." 6. As proper compensation for the maintenance of the running gear and bodies of the cars, the defendant was to pay plaintiff "three cents per car per mile for every mile run by said cars upon the road of the railway company or upon the roads of other companies by direction of the officers of the railway company while in service under this contract;" and, at all times, when requested by the plaintiff, to make promptly such repairs to the cars furnished under the contract as might from time to time be-

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come necessary, and, without request, make such repairs as were required "to insure their safety, rendering bills monthly to the Pullman Company for repairs to cars and charging for the same only the actual cost of material and labor expended on such repairs, with an addition of ten per cent to cover general expenses, all settlements and payments for mileage and repairs to be made monthly between said companies." 7. Whenever the revenue from sales of seats and berths equalled an average of $7500 per car per annum upon the number of cars furnished under the contract, then, and while such revenue continued, the defendant should not pay mileage for any car so furnished; the plaintiff, in such case, to bear the expense of all repairs and improvements to its cars, "except such repairs as are rendered necessary by accident or casualty and such as are provided for in article sixth of this agreement, which shall be made by the railway company, as hereinbefore mentioned." 8. The plaintiff was to have the exclusive right, for a term of 15 years, from the date of the agreement, to furnish drawing-room and sleeping cars for the defendant's use on all its passenger trains on roads then or subsequently controlled or owned by it, and on roads over which it had the right to run such cars; the defendant not to "contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years." 9. In case either party failed to cleanse or repair any of the cars, according to the conditions of the agreement, and the party so in default should neglect and refuse to perform its agreement in this respect within a reasonable time after notice of such default, the other party had the right to cleanse, and make or cause to be made all necessary repairs and renewals to said cars, at the cost of the party in default. 10. If either party failed, at any time, to keep and perform its covenants, as set forth in the agreement, the one not in default, after the expiration of a reasonable time from the service of written notice of such default, was at liberty to declare the contract at an end. 11. The defendant was given the option to terminate the contract at the end of five, eight, or eleven years, upon written notice to the plaintiff, served six months before the day fixed

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for such termination; and, if the contract was so terminated, without default upon the part of the plaintiff, the defendant was required to purchase the cars and equipments of the Pullman Company "then in use or assigned and accepted for use" under the contract, or such interest therein as the defendant may not have previously acquired under the provisions of this contract, at the actual cash value of the same," with the right to use them without charge for patent rights for their interior arrangements. For the purposes of the option given to terminate the contract, it was agreed "that the cars now [then] running on said railroad, and which should form part of the cars and equipments to be furnished under this contract, together with such additional cars and equipments as may hereafter be assigned to the railway company, shall be appraised, etc." 12. The taxes upon all cars furnished to the defendant by the plaintiff were to be paid equally by the parties.

It was in proof that at the time of the fire the cars Great Northern and Louisiana were insured for the plaintiff; that before the commencement of this action the insurance companies paid to it, in full settlement of the loss and damage, the sum of $19,000; and that this action is prosecuted under a written agreement between the plaintiff and the insurance companies, that it should be conducted jointly by their counsel, and the amount recovered by suit, settlement or compromise, equally divided between them.

The ten cars mentioned in the agreement of April 5, 1879, were furnished to the defendant and were used on its road. Subsequently to that date, the plaintiff having complained of the manner in which its cars were repaired at the defendant's shops in McComb City on its road about 105 miles above New Orleans, the latter, by its president, suggested that the plaintiff repair its own cars. Thereupon, in order to facilitate such repairing, a part of the passenger-car depot shed of the defendant in New Orleans was set apart to the exclusive use and control of the plaintiff, which, at its own expense, fitted up the portion so assigned to it — one part as a linen room, one as a carpenter shop, one as an upholstery room and one

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as a paint shop — enclosing the same with partitions, and keeping it locked with the keys in possession of its own employés. The place so fitted up was known as the "Pullman repair shop." The employés of the defendant had no right of access to it. Although the tracks of the defendant extended into this repair shop, there were folding-doors across them that were closed by an iron bar on the inside. The plaintiff paid nothing for the use of this shop. The watchman over the whole premises was maintained by the defendant. With the permission and consent of the defendant, the plaintiff, on one or two occasions, repaired and varnished in that shop cars assigned by it to other railroads, and not covered by the agreement in question.

The fire in question "originated from a cause unknown" in the "Pullman repair shop." It occurred about 3 o'clock on the morning of the 27th of May, 1882, and resulted in the total destruction of both the Great Northern and the Louisiana. The Great Northern was at the time standing on the defendant's track in the paint room of that shop, behind the barred folding-door across the railroad tracks. It had been there since the previous October undergoing repairs, refitting, and revarnishing, and its name changed to that of "Chatawa." But for its destruction it would have been in condition on the day succeeding the fire to be again put into service under the contract of 1879. There was no evidence that any other car was furnished to take its place on the defendant's road while it was in the shop undergoing repairs. When the fire occurred, the Louisiana was standing on the defendant's track, in New Orleans, under a depot shed belonging to it, and used to store cars when not in actual transit — those belonging to it as well as those belonging to the plaintiff. That shed was called by the defendant's employés the "Pullman shed." The Louisiana reached New Orleans about 3 o'clock in the afternoon of May 26, 1882, from a trip over defendant's road, was placed in the above depot shed, and was to have been sent out on another trip at 6 o'clock on the afternoon of May 27, 1882. The Great Northern, when burned, was under the same depot shed, but, as already stated, in that part known as the Pullman

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repair shop. It is in evidence, that at various times during the existence of the contract sued on, the plaintiff took some of the ten cars, furnished under it, to shops in St. Louis, Missouri, and Pullman, Illinois, entirely off the line of defendant's road, in order to be repaired, so as to bring them up to the designated standard.

The question of negligence was left to the jury, which was instructed that the plaintiff could not recover if the fire was caused by its negligence.

1. The jury were instructed, at the request of the plaintiff, that a damage or destruction by fire is a casualty or accident within the meaning of the contract. This the defendant contends was error. We do not think so. The fire that destroyed the Great Northern and the Louisiana originated, as we have seen, from a cause unknown. An accident or casualty, according to common understanding, proceeds from an unknown cause or is an unusual effect of a known cause. Either may be properly said to occur by chance and unexpectedly. Webster's Dict.; Imperial Dict. It was no doubt used in that sense by the parties to the contract in question. They manifestly contemplated that the railroad company should assume all responsibility for the loss of drawing-room or sleeping cars, while in use, or subject to be used, by it, with the single exception, distinctly made, of loss or damage occurring "from defective heating apparatus or lights furnished" by the Pullman Company, which assumed all responsibility for loss or damage to its cars resulting from either of the latter causes. This exception in respect to defective heating apparatus and lights furnished by the plaintiff — necessarily referring to loss or damage by fire caused in either of those modes — renders it clear that the railroad company assumed responsibility for the loss of cars used or subject to be used by it under the contract, whenever such loss was by fire occurring from a cause unknown, that is, accidentally or from casualty.

2. The jury were instructed that the insurance of the cars by the plaintiff was *res inter alios acta* and had no determining effect upon the right of the plaintiff to recover in this action. The giving of this instruction has been assigned for

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error. We are of opinion that the obtaining of insurance by the plaintiff, the collection of $19,000 in full settlement of its claim against the insurance companies, and the agreement between it and them for the bringing of this action for their joint benefit, were matters with which the railroad company had no concern, and cannot affect the determination of this case. By the provisions of the policies, the insurance companies were entitled, in case of loss, to an assignment of the plaintiff's right to recei.e satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of the insurer. Upon payment of the loss, or to the extent of any payment by them on account of such loss, the insurance companies were subrogated to the rights of the insured, and could, in the name of the insured, or in their joint names, maintain an action against the railroad company for indemnity, if that company was liable to the insured for the loss of the cars. The acceptance of a given amount from the insurance companies in full discharge of their liability, did not affect the right of the plaintiff to recover from the railroad company the whole amount of the loss for which the latter was responsible under its contract. The plaintiff could recover only one satisfaction for the loss; and if the amount recovered from the railroad company, increased by the sum collected from the insurance companies, was more than sufficient for its just indemnity, the excess would be held by it in trust for the insurance companies. The inquiry in this action is as to the amount for which the railroad company is bound on *its* contract with the plaintiff, and the recovery is not affected or limited by the amount collected from the insurance companies. As said in *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584, 593 — which was a suit against a carrier — "although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been

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paid by the insurer, the insured is entitled to the residue." See also *Phœnix Insurance Company* v. *Erie Transportation Company*, 117 U. S. 312, 320, 321. This is because, as said by Chief Justice Shaw in *Hart* v. *Western Railroad Corporation*, 13 Met. 99, the liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. So in *Weber* v. *Morris & Essex Railroad*, 35 N. J. Law, 409: "Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity, and the insured and insurer regarded as one person; therefore, payment by the insurer before suit brought cannot affect the right of action." To the same effect are numerous other cases. *Fretz* v. *Bull*, 12 How. 466, 469; *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 370; *Merrick* v. *Van Santvoord*, 34 N. Y. 208; *Conn. Fire Ins. Co.* v. *Erie Railway*, 73 N. Y. 399; *Clark* v. *Wilson*, 103 Mass. 219; *Hayward* v. *Cain*, 105 Mass. 213; *Gales* v. *Hailman*, 11 Penn. St. 515; *Perrott* v. *Shearer*, 17 Michigan, 48; *Peoria Ins. Co.* v. *Frost*, 37 Illinois, 333; *Conn. Mut. Life Ins. Co.* v. *New York & New Haven Railroad*, 25 Connecticut, 265; *Swartwout* v. *Chicago & Northwestern Railway*, 49 Wisconsin, 625. The principle is thus stated by Lord Blackburn in *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, 339: "The general rule of law (and it is obvious justice) is, that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped, by having that amount back." *Castellain* v. *Preston*, 11 Q. B. D. 380. It results that the court was right in holding that the insurance upon the cars and the collection by plaintiff of the insurance money were immaterial matters in

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this litigation. The action was well brought in the name of the plaintiff pursuant to its agreement with the insurance companies.

3. It is assigned for error that the court refused to instruct the jury that the agreement sued on was void as against public policy, because of the exclusive rights given to the plaintiff for the term of fifteen years in respect to drawing-room and sleeping cars furnished by it to the defendant, supplemented by the stipulation that the defendant would not "contract with any other party to run the said class of cars on and over said lines of road during said period of fifteen years;" and because the law will not permit individuals to oblige themselves by a contract, when the thing to be done or omitted is injurious to the public. *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 66; *Chappel* v. *Brockway*, 21 Wend. 157, 159. Such a contract, it is argued, is in general restraint of trade. The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them. *Express Cases*, 117 U. S. 1, 24, 25. We cannot perceive that such a contract is at all in restraint of trade. The plaintiff was at liberty, so far as that contract was concerned, to make similar arrangements for the accommodation of passengers on all other railroads in the country, even those that are rivals or competitors in business with the defendant.

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It is, however, a fundamental condition in all such contracts that their provisions must not be injurious to the public. As said by this court in *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 657, a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends. A railroad corporation cannot, therefore, without the sanction of the government creating it, make any agreement that militates against the public convenience, or that will defeat the public objects for which it was established. If the contract in suit was liable to objection upon these grounds, a different question would be presented for our determination. But we are of opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing-room and sleeping cars to be used by its passengers, and, as a means of inducing the plaintiff to perform this public service and to incur the expense and hazard incident thereto, from giving it an exclusive right to furnish cars for that purpose. The defendant did not, by such an agreement, abandon the duty it owed to the public; for the cars so furnished, while in its possession and use, became, as between it and its passengers, its own cars, subject to such regulations as it might properly establish for the comfort and safety of passengers on its trains. *Pennsylvania Company* v. *Roy*, 102 U. S. 451, 457. And the contract is to be interpreted in view of the condition, implied by law, that the plaintiff should furnish cars not only adequate and safe but sufficient in number for the use of the public desiring to travel over the defendant's roads. These conditions exist independently of the particular clause giving the railroad company the option to terminate the agreement at the end of five or eight or eleven years. Being imposed by law, as necessary to the public interests, they could not be dispensed with by agreement of the parties. The designation of particular periods of time, at the end of either of which the defendant might, of right and upon notice, terminate the agreement, did not tie its hands so that it could not continuously discharge its duty to the public in respect to the adequacy or safety of cars in which it conveyed passengers.

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The stipulation, therefore, that the plaintiff, not being in default, should have the exclusive right for fifteen years to furnish drawing-room and sleeping cars for the defendant's use, and that the defendant should not, during that period, contract for cars of that kind with any other party, rightly construed is not unreasonable, and, properly performed, will promote the convenience of the public in that it enables the defendant to have on its lines, at all times, and as the requirements of travel demand, drawing-room and sleeping cars for use by passengers. It is a stipulation that does not interfere in any degree with its right and duty to disregard the contract whenever the plaintiff fails in furnishing cars that are adequately safe and sufficient in number for the travel on defendant's lines. The suggestion that the agreement is void, upon grounds of public policy, or because it is in general restraint of trade, cannot, for the reasons stated, be sustained.

Besides, it is not clear that the agreement is so far indivisible, that the stipulation giving the plaintiff the exclusive rights in question, and binding the defendant not to make similar contracts with other parties for drawing-room and sleeping cars to be used on its lines, cannot be separated from the other provisions. If that stipulation were held to be void, upon the grounds suggested, we should be inclined to hold that, as between the parties, the provision making the railroad company liable for loss or damage, arising from casualty or accident, to the plaintiff's cars, while in the possession of and subject to use by the defendant, remained in force. *Erie Railway Co.* v. *Union Locomotive and Express Co.*, 35 N. J. Law, 240, 246.

4. There can be no doubt that the railroad company was, under the evidence, liable to the plaintiff on account of the loss by fire of the Louisiana. The contract covered cars that were assigned by the plaintiff to the defendant's use, while they were in actual transit over its lines or over the lines of other companies on whose roads they were sent by the defendant. It equally covered such as were under the defendant's immediate control while in its own yards or sheds for the purpose simply of being cleansed and resupplied for

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another trip when the defendant chose to put them into actual service. That was the situation at the time of the loss by fire of the Louisiana. It had a few hours before come from active service on the defendant's road, and, but for its destruction, would have been put upon the road for another trip in the afternoon of the very day of the fire. Such a case is plainly embraced by both the letter and spirit of the contract. A peremptory instruction to find for the plaintiff in respect to the Louisiana would not have been erroneous.

5. The remaining instructions involved the liability of the defendant on account of the destruction by fire of the car Great Northern. The defendant asked the court to instruct the jury as follows: "That if the jury believe from the evidence that the defendant company, by arrangement with the plaintiff company, in the year 1879, set apart at their depot in the city of New Orleans a certain portion of said depot for the exclusive use and benefit of plaintiff as a repair shop, wherein the cars of the plaintiff mentioned in the contract sued on were to be repaired by the plaintiff at its own expense, and the said space was inclosed, fastened and locked, and the keys thereof were kept by the plaintiff or its agents so that access thereto by the defendant or its agents was only such access as was necessary to enable the defendant company to take possession of repaired cars when tendered for service by the plaintiff, and that at the time of the fire, on the 27th of May, 1882, the car Great Northern was in the said repair shop, and had been there for a period exceeding six months, for the purpose of being repaired, and that at the time of the fire said car had not been tendered for service as a car completely repaired and equipped for service to the defendant, although ready to be tendered, then the jury must find that the defendant is not liable for the loss of the said car Great Northern or for any damage thereto by fire aforesaid." This instruction was refused except with this modification: "Unless the jury further find that the said car had been withdrawn from the dominion of the contract, and it was held, according to the understanding of both parties, for some other purpose — that is, for some other purpose than those of the contract."

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The court, in its general instructions to the jury, said: "It was undoubtedly competent for the parties to this action to have withdrawn their cars from the dominion of the contract, but to constitute such a withdrawal there must be the intent of the plaintiff to retain them for some purpose other than to continue their use under the contract; and if the jury find that there was a placing of the cars in the separate room or apartment with the intent, on the part of the plaintiff, to use them independently of the contract and not under it, then the defendant would not be liable for their destruction. If, on the other hand, the jury find that though there was a placing of the cars in the separate room or apartment, but with the intent to continue to use them under the contract, and to hold them so placed merely for the purpose of repair under the contract, and the defendant shared this intent, then the defendant would be responsible for their destruction by fire. In determining this question the jury will consider all the facts and circumstances established, including the fact that the cars remained on the tracks of the defendant, and will further consider whether the defendant is shown to have any relations to these cars except under the contract."

The defendant, also, asked this instruction: "That if the jury believe that the two cars, Louisiana and Great Northern, were destroyed by fire at the depot of the defendant company, while the said cars were not in actual use and service by the defendant company, then they must find a verdict for the defendant." The court refused to give this instruction, saying: "I refuse that instruction, provided you find that they were being repaired under the contract. That's the test which the court gives you all the way through — whether these cars, according to the meaning of the parties, were or were not under the contract, the contract providing for repairing as well as running." The court having, in this connection, instructed the jury, at plaintiff's request, that "the said contract covers the said cars while standing on the tracks of the defendant in the yards, and under the sheds used for storing cars while not in transit," said that the contract covered the cars "while standing on the tracks of the defendant in its

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yards and under the sheds used for storing cars while not in transit, but while held for transit or repair on defendant's tracks under the contract."

It was not error to refuse that one of defendant's requests for instructions, predicated upon the theory that its liability for the loss of a car from accident or casualty depended upon such car being, at the time, in its "actual use and service." Of course, the defendant meant by this instruction, and the jury would have understood, that a car was not in actual service while it was standing on the defendant's tracks, "between trips." That theory would have relieved it from responsibility for the loss of the Louisiana, although that car had come from the road only a few hours previous to the fire, and was, when destroyed, in the immediate possession and control of the railroad company, being cleansed and prepared for the use of passengers on another trip to be entered upon in the afternoon of the day of the fire. We have already said that this interpretation of the contract was unsound. But we are of opinion that the court below erred in not giving, without modification, the first of the above instructions asked by the defendant. By the terms of the agreement, the railroad company was bound, upon request, to make promptly such repairs of the cars furnished to it as might from time to time become necessary, and, without request, to make such as their safety demanded. The length of time the Great Northern was in the repair shops indicated either that repairs were necessary to its safety or that "the requirements of travel" did not make it necessary to assign another sleeping car in its place. But whatever may have been the fact in that regard, the Great Northern was not, within any fair interpretation of the contract, in the possession or under the control or supervision of the defendant, or subject to be used under and for the purposes of the contract, while it was in a repair shop of which the plaintiff had the keys, and to which the defendant's employés had no access. We do not mean to say that a car, furnished by the plaintiff, ceased to be under "the dominion of the contract" while it was being repaired as provided for in the contract. On the contrary, if the Great Northern had

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been destroyed by fire, the result of accident or casualty, while in the possession of the defendant, undergoing ordinary repairs, it would have been liable for the loss. No doubt the defendant's assent to liability for losses or damages resulting from accident or casualty, was because the agreement contemplated that the cars furnished to and held by it under the contract would be, all the time, — whether they were on its road in actual service or in its shops undergoing repairs, — in its immediate possession and control, thereby insuring the safety of the cars, so far as the vigilance of its own employés was concerned, from loss or damage from the causes named. But the Pullman Company became dissatisfied with the manner in which the repairs were made by the defendant, and undertook itself to make such repairs, in a shop set apart to it for that specific purpose, and placed under its exclusive control, and to which the defendant's agents had no access. The defendant agreed to be liable for loss or damage, from accident or casualty, if the loss occurred while the cars were in its possession, subject to be used by it or subject to its control, care and supervision; but not otherwise. That is the meaning of the contract. Looking at the whole agreement, and giving full force to all its provisions, the defendant cannot be held to have agreed to be liable for loss or damage accruing from accident or casualty, while the cars were in the exclusive possession and subject to the entire control of the plaintiff, and not subject to be used, controlled or cared for by the defendant, until the plaintiff chose to surrender its exclusive possession, and return the cars to the possession and control of the railroad company. Upon the theory sanctioned by the court below, we do not perceive but that the defendant would have been liable for the loss of the Great Northern, if it had been removed to the shops of the Pullman Palace Car Company at Pullman, Illinois, to be repaired, and, after being there from October, 1881, until May, 1882, had been burned up while in those shops — a result that surely could not have been contemplated by the parties. In our opinion, the evidence did not disclose a case of liability under the contract, upon the part of the defendant, for the destruction by fire of the Great

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Northern; and an instruction to the jury to that effect would not have been improper.

The judgment is reversed and the cause remanded for a new trial in conformity with this opinion.

MR. JUSTICE BLATCHFORD did not sit in this case or take any part in its decision.

CLARK *v.* BEVER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 116. Argued December 15, 16, 1890. — Decided March 2, 1891.

In 1872, an Iowa railroad corporation, being indebted to a construction company in the sum of $70,000 which it was unable to pay in money, had a settlement with the latter, whereby the debt was paid in shares of the stock of the railroad company of the par value of $350,000. The stock was taken at 20 cents on the dollar, but was not, at the time, worth anything in the market. Greene, a member of the construction company, received 910 shares as his part. Subsequently, in 1876, the railroad and its appurtenances were sold under a decree foreclosing a mortgage given to secure the bonds of the railroad company. Clark, a holder of bonds issued by the railroad company in 1874, obtained judgment for the amount due him, upon which execution was issued and returned in 1880, no property. Greene having died, Clark brought suit against his administrator in one of the circuit courts of Iowa, sitting in probate, to hold his estate liable for the difference between what was paid for the stock, and its face value, upon the ground that the stock of the corporation was a trust fund for creditors, and that as between creditors and stockholders, the latter was bound to account for its face value. Upon the petition of Clark, the case was removed to and tried in the Circuit Court of the United States, where a verdict was returned by direction of the court for the defendant. *Held,*

(1) That as the proceeding involved a judicial determination of the liability of Greene's estate for the claim in question, with parties before the court to contest all questions of law and fact, it was a "suit" within the meaning of the act of Congress providing for the removal of suits from the state courts. It is not competent for a State, by legislative enactment conferring upon its own courts exclusive jurisdiction of proceedings or suits involving the

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settlement and distribution of the estates of deceased persons, to exclude the jurisdiction in such matters of the courts of the United States, where the constitutional requirement as to citizenship of the parties is met;

(2) That the value of the matter in dispute here is the amount of the claim the plaintiff seeks to establish, and that amount being in excess of $5000, without costs, this court has jurisdiction without reference to any inquiry as to what might be ultimately realized from Greene's estate, if the claim be established;

(3) That the estate of Greene is not liable for the face value of the stock by reason of the statute of Iowa providing that nothing therein contained "exempts the stockholders of any corporation from individual liability to the amount of the unpaid instalments on the stock owned by them or transferred by them for the purpose of defrauding creditors, and execution against the company may to that extent be levied upon such private property of any individual." Revision of Iowa, 1860, sec. 1172; Code of 1873, sec. 1082;

(4) That whether a stockholder in law or in fact, owed to the corporation any sum on the stock held by him, was left by the statute to be determined in each case, upon its own circumstances, and in accordance with the principles of general law touching the rights and liabilities of creditors and stockholders.

While the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund *sub modo* for the benefit of its general creditors, a corporation — no statute forbidding — may in good faith sell or dispose of its stock to creditors in discharge of their debts.

The principle reaffirmed that when the interest of the public or of a stranger is to be affected by any transaction between the stockholders owning a corporation, and the corporation itself, such transaction is subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it will be disregarded or annulled so far as it inequitably affects him. Therefore, when the interest of creditors requires, those holding shares in a corporation, purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint.

The doctrine reaffirmed that the federal courts, sitting in any State, have equal and coördinate jurisdiction with the state court in determining questions of general law, although they will, in cases of doubt, lean to an agreement of views with the state court.

The case is stated in the opinion.

Mr. P. Henry Smyth for plaintiff in error.

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Mr. Charles A. Clark for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

In the year 1872, the Burlington, Cedar Rapids and Minnesota Railway Company — of which at the time the intestate George Greene was president, as well as a stockholder, and of which he continued to be president until February, 1875, — had a settlement with the Northwestern Construction Company, of which also Greene was a member, for work done in building a part of its road. This settlement showed the sum of $70,000 to be due the Construction Company. The railway company, being unable to pay this claim in money, delivered to the Construction Company thirty-five hundred shares of its stock, at twenty cents on the dollar, each share being for $100, and the same was accepted in full satisfaction of the debt. The stock, which was not worth anything in the market, was issued directly to the members of the Construction Company, the intestate Greene receiving 910 shares as his portion. No other payment than this twenty per cent was made for or on account of the stock. The good faith of the parties in making this arrangement is not impugned by allegation or proof. The Construction Company was reluctant to take the stock, and insisted upon payment in cash. What the original stockholders paid for their shares does not appear. Nor does the record show whether or not Greene exercised any of the privileges of a stockholder.

Prior to the above settlement a resolution was adopted February 7, 1871, by the executive committee of the railway company to the effect that, in the adjustment or liquidation of claims against the company, the treasurer be authorized to use its stock, if not less than twenty per cent of its par value could be realized for the purpose. At the time the stock was issued to Greene, the financial condition of the company was as follows: The bonded indebtedness of its main line was $5,400,000; its floating debts over $1,000,000; its net earnings in 1871 and 1872 and subsequently were not sufficient to meet the interest on its bonded debts; and in March, 1872,

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when the settlement in question was made, it was without means to pay its floating debt or the interest on its bonded debt, except from net earnings and such money as could be realized from its stock and bonds and by borrowing.

The railway company continued to operate the road until May 19, 1875, on which day, in a suit brought in the United States Circuit Court for the District of Iowa to foreclose mortgages given by it to secure outstanding bonds, a receiver of its property was appointed. At this time the general condition of the company was this: Its bonded debt was $10,400,000, upon which no interest had been paid since November 1, 1873, and its floating debt amounted to $1,250,000, and it had no means with which to pay it. In the above suit a sale under a decree of foreclosure was made in July, 1876, when the railroad and all its property were purchased and have since been owned by the Burlington, Cedar Rapids and Northern Railway Company. After the appointment of the receiver, the Burlington, Cedar Rapids and Minnesota Railway Company ceased to do business or to exercise its franchises as a corporation.

It should be stated, in this connection, that Greene on the 10th of February, 1875, transferred the above 910 shares to John I. Blair, a gentleman of large fortune and financially responsible for the balance, if any, due on that stock. At the instance of the Western managers of the Burlington, Cedar Rapids and Minnesota Railway Company, Mr. Blair undertook to save it from bankruptcy. But, ascertaining that the company's overissue of bonds was so great and its liabilities so large, that it was necessary to commence foreclosure proceedings and to make application for the appointment of a receiver, he returned to Greene and others all the stock received by him.

Clark, the plaintiff below, a citizen of Ohio, being the holder of fifty gold bonds of one thousand dollars each of the Burlington, Cedar Rapids and Minnesota Railway Company, dated June 1, 1874, payable in the year 1914, and bearing interest at seven per cent per annum — which bonds were part of a series of two thousand, each for one thousand dol-

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lars, secured by mortgage upon the company's net income, rolling stock and additions, and convertible at the option of the holder into capital stock — brought suit to recover the amount due thereon, and on the 4th of June, 1878, recovered judgment against the railroad company for the sum of $65,517, to bear interest from that date. We infer, though the record contains no distinct statement or proof on the subject, that the bonds became due and payable prior to this suit, on account of default in the payment of interest. Execution was issued upon the judgment and was returned August 10, 1880, no property found.

The present suit was commenced July 5, 1881, by Clark against the administrator of Greene, a citizen of Iowa, in the Circuit Court for Linn County, in that State. The petition, after setting out the foregoing judgment, the return of the execution thereon unsatisfied, and the ownership of the 910 shares of stock by Greene up to his death, and by his estate since, alleged "that of the value of said shares of stock owned by said decedent there has been paid only the sum of eighteen thousand two hundred dollars, or about twenty per centum of the full value of said stock, and there is still due upon said shares a balance of eighty per centum of their full value, amounting to the sum of seventy-two thousand and eight hundred dollars; that the said balance due upon said shares was a trust fund in the hands of said decedent for the payment of said judgment and is still a trust fund for that purpose in the hands of decedent's administrator; that the defendant herein is the administrator of the estate of said George Greene, deceased, duly appointed and qualified; that said decedent in his lifetime failed and neglected to pay or cause to be paid the said judgment or any part thereof, and this defendant has failed and neglected to pay or cause to be paid the same or any part thereof, and the said judgment is still due and wholly unpaid." The prayer of the petition was for a judgment against the defendant as administrator for the whole amount of the plaintiff's claim, with interest and costs, and that it be allowed by the court as a just claim against Greene's estate.

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The case was subsequently removed upon the petition of Clark to the Circuit Court of the United States for the District of Iowa, and thereafter by consent was transferred to the Eastern Division of the Southern District of that State.

The defendant, besides denying each allegation of the plaintiff's claim and petition, pleads, in bar of the action, the statute of limitations of Iowa, and, also, a certain settlement and compromise between the plaintiff and the railway company. To this answer a replication was filed by the plaintiff.

After the evidence was concluded the plaintiff asked several instructions based upon the general ground that the stock used in discharging the debt of the Construction Company was a trust fund for the benefit of creditors, and that, without reference to the necessities of the railroad company or the good faith of the transaction, Greene was accountable to the creditors of the latter corporation for the par value of the stock issued to him under the settlement or compromise of 1872, whatever may have been its market value at the time he got it or at the time this action was commenced.

The court below refused to so instruct the jury, and held, as matter of law, that upon the evidence the intestate Greene, by taking the 910 shares of stock upon which the twenty per cent was paid, did not become liable to pay anything further on account thereof to creditors of the railway company; and, pursuant to its direction, the jury returned a verdict for the defendant. *Clark* v. *Bever, Adm'r*, 31 Fed. Rep. 670.

The questions to be first considered relate to the jurisdiction of the court below and of this court.

This proceeding was commenced in one of the Circuit Courts of Iowa, having general original jurisdiction in all civil actions and special proceedings, and original exclusive jurisdiction, in the respective counties of the State, among other things, "of the settlement of the estates of deceased persons." Of the filing of a claim against the estate of a deceased person, the executor or administrator is entitled to notice, to be served "in the manner required for commencing ordinary proceedings," unless the claim be expressly admitted in writing with the approbation of the court, and when not so admitted "the

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court may hear and allow the same, or may submit it to a jury." On such hearing, unless otherwise declared, the court is governed by the provisions of law applicable to an ordinary proceeding. When a claim is allowed, it is "placed in the catalogue of established claims, but shall not be a lien." Code of Iowa, 1873, secs. 161, 2312, 2370, 2408, 2409, 2410, 2411, 2416. No other court of the State, except a Circuit Court, has jurisdiction to allow or disallow a claim against the estate of a deceased person. *Tillman* v. *Bowman*, 68 Iowa, 450; *Shropshire* v. *Long*, 68 Iowa, 537. While an order allowing such a claim is not an ordinary judgment upon which an execution may issue, it is an "adjudication" establishing that claim as one to be paid by the executor or administrator so far as the estate in his hands is sufficient. *Foteaux* v. *Lepage*, 6 Iowa, 123; *Voorhees* v. *Eubank*, 6 Iowa, 274; *Little* v. *Sinnett*, 7 Iowa, 324; *Smith* v. *Shawhan*, 37 Iowa, 533; *Dessaint* v. *Foster, Adm'r*, 72 Iowa, 639, 640. It is suggested that the claim in suit here is a mere incident to the marshalling and distribution of the estate of Greene; that such estate can only be administered and distributed by the state court in accordance with the laws of the State; and that the Circuit Court of the United States was without jurisdiction to determine whether it was or not a valid claim against that estate. This position is wholly untenable. As the proceeding involved a judicial determination as to the liability of Greene's estate for the amount of Clark's claim, with parties before the court to contest all the questions of law and fact, it was clearly a "suit," within the meaning of the act of Congress providing for the removal of suits to the Circuit Courts of the United States. The removal in this case was, therefore, proper, unless it be competent for a State, by legislative enactment conferring upon its own courts exclusive jurisdiction of all proceedings or suits involving the settlement and distribution of the estates of deceased persons, to exclude the jurisdiction of the courts of the United States even in cases where the constitutional requirement as to citizenship is met. But this court has decided, upon full consideration, that no such result can be constitutionally effected by state legislation. The case of

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Hess v. *Reynolds*, 113 U. S. 73, 77, involved a disputed claim originally filed in a probate court of Michigan, carried by appeal to a Circuit Court of the same State, and subsequently removed to the Circuit Court of the United States for the District of Michigan. Substantially the same question of jurisdiction was raised in that case that is here presented. This court said: "It may be convenient that all debts to be paid out of the assets of a deceased man's estate, shall be established in the court to which the law of the domicil has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But neither the principle of convenience, nor the statutes of a State, can deprive them of jurisdiction to hear and determine a controversy between citizens of different States, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally, or by removal, in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents." See also *Payne* v. *Hook*, 7 Wall. 425; *Boom Company* v. *Patterson*, 98 U. S. 403; *Ellis* v. *Davis*, 109 U. S. 485; *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 487; *Upshur County* v. *Rich*, 135 U. S. 467, 477.

It is next contended that, under the statutes of Iowa governing the settlement of the estates of deceased persons, the plaintiff in error has only an interest in the "fund" arising from Greene's estate; and as it does not appear, affirmatively, that such interest exceeds, or can exceed, in value the sum of five thousand dollars, this court is without jurisdiction and the writ of error should be dismissed. This contention must be overruled. The plaintiff seeks a judgment against the

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estate of Greene for the sum of $65,523.20, with interest. The defendant disputes the whole of that claim. The sum sued for — the entire claim having been rejected — is the value of the matter in dispute here; and our jurisdiction to determine that dispute cannot depend upon an inquiry as to whether the estate of Greene, when fully distributed, may or may not yield to the plaintiff, if successful here, something in excess of five thousand dollars. Such an inquiry is as inadmissible, on this writ of error, as it would be if the judgment had established the claim of the plaintiff against Greene's administrator for the full amount, and a writ of error had been prosecuted by him to reverse that judgment. The case is different from *Miller* v. *Clark*, 138 U. S. 223, decided at the present term, where the appeal was dismissed, because it appeared, affirmatively, that the appellant, who was the plaintiff below, did not claim, and could not possibly recover, *for himself*, a sum in excess of $5000.

We come now to consider the principal questions in the case. They relate to the liability of the defendant for the difference between the face value of the stock issued to Greene in 1872 and the value at which it was rated in the settlement of that year with the Burlington, Cedar Rapids and Minnesota Railway Company. The general proposition advanced by the plaintiff is, that it was not competent for the railway company to issue to Greene and his associates in discharge of its debt to them, amounting to $70,000, thirty-five hundred shares of stock of the par value of $350,000, although the settlement upon that basis may have been demanded by the best interests of the company, and was made in good faith without intention to harm the corporation or to defraud its creditors, existing or subsequent, and although the stock at the time "was not worth anything in the market;" and that Greene took the 910 shares issued to him for twenty per cent of its face value, subject to the implied condition that he should be liable for any unpaid debts of the corporation to the extent of the difference between the face value of the stock and the amount at which it was taken by him. It is not contended that such liability arises from the relations Greene held

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to the two companies making the settlement of 1872, but from the obligations the law imposed for the benefit of creditors both upon the corporation issuing the stock and its stockholders. Of course, under this view, every one having claims against the railway company — even laborers and employés — who could get nothing except stock in payment of their demands, became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although, at the time it was sought to make them liable, the corporation had ceased to exist, or its stock had remained, as it was when taken, absolutely worthless. Such the plaintiff, in effect, insists is the law of Iowa.

The statutory provisions that are supposed by the plaintiff to sustain his position, which were in force when the stock in question was issued, are found in Title X, chapter 52 of the Revision of the Statutes of Iowa of 1860, relating to the creation of corporations for the transaction of any lawful business, including the establishment of ferries, the construction of canals, railways, bridges or other works of internal improvement. (Sec. 1150.) Among the powers which such corporations may exercise are "to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy," and "to establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs in accordance with law and not incompatible with an honest purpose." (Sec. 1151.) Articles of incorporation were required to be recorded in the office of the recorder and Secretary of State. (Sec. 1152.) A notice of the incorporation must be published, containing the name of the corporation and its principal place of transacting business; the general nature of such business; the amount of capital and stock authorized and the terms and the conditions on which it is to be paid in; the time of the commencement and termination of the corporation; by what officers or persons the affairs of the corporation are to be conducted, and the times at which they will be elected; the highest amount of indebtedness or liability to which the corporation is at any time to subject itself; and whether private property is to be

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exempt from corporate debts. (Secs. 1154, 1155.) A failure to comply with the above and other provisions in relation to organization and publicity, rendered the individual property of all the stockholders liable for the corporate debts, except that stockholders in railway companies were made liable only for the amount of stock held by them in such companies. (Secs. 1166, 1338.) Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, subjected those guilty thereof to fine and imprisonment, or both, at the discretion of the court. (Sec. 1163.) The practice of fraud in the manner mentioned caused a forfeiture of all the privileges conferred, and the courts could proceed, upon information, to wind up the business of the corporation. (Sec. 1167.) A copy of the by-laws of the corporation and a statement of the amount of capital stock subscribed, the amount actually paid in, and the amount of the indebtedness in a general way, was required to be kept posted up in the principal places of business, subject to public inspection, such statement to be corrected as often as any material change took place in relation to any part of the subject matter of the statement. (Secs. 1161, 1162.)

The provisions upon which the plaintiff particularly relies are the following:

"SEC. 1169. The transfer of shares is not valid except as between the parties thereto until it is regularly entered on the books of the company so far as to show the name of the persons by and to whom transferred, the number or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person or persons making such transfer from any liability or liabilities of said corporation which were created prior to such transfer."

"SEC. 1172. Nothing herein contained exempts the stockholders of any corporation from individual liability to the amount of the unpaid instalments on the stock owned by them or transferred by them for the purpose of defrauding creditors, and execution against the company may to that extent be levied upon such private property of any individual.

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"SEC. 1173. In none of the cases contemplated in this chapter can the private property of the stockholders be levied upon for the payment of corporate debts while corporate property can be found with which to satisfy the same, but it will be sufficient proof that no property can be found if an execution has issued on a judgment against the corporation and a demand thereon made of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property.

"SEC. 1174. The defendant in any stage of a cause may point out corporate property subject to levy, and upon his satisfying the court of the existence of such property by affidavit or otherwise the cause may be continued or execution against him stayed until the property can be levied upon and sold, and the court may subsequently render judgment and order execution for any balance which there may be after disposing of the corporate property according to the stage of the cause; but if a demand of property has been made, as contemplated in the preceding section, the costs of such proceedings shall in any event be paid by the company or by the defendant."

These provisions are substantially preserved in the Iowa Code of 1873. §§ 1058, 1059, 1062, 1063, 1068, 1071, 1078, 1082, 1083, 1084.

The argument in behalf of the plaintiff assumes that, consistently with these statutory provisions, no one can, under any circumstances whatever, become the owner of the stock of an Iowa corporation, except subject to the condition that, where property of the corporation cannot be found, the private property of the stockholder may be seized under execution in favor of a judgment creditor to the extent of the difference between what he actually paid for the stock, whether in money or in property, and its face value. And it is further insisted that, independently of the statute, such is the doctrine of general law relating to subscriptions to the stock of corporations, as announced by this court in several cases. We are of opinion that neither of these positions can be maintained.

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The local statute undoubtedly proceeds upon the ground that unpaid instalments of stock subscribed constitute — no other rule being prescribed by legislative enactment — a trust fund for the benefit of creditors. But it does not declare that a corporation is without power, under any circumstances whatever, to dispose of its stock at less than par, or that stock purporting to be full paid shall, in all cases, and without reference to the circumstances under which it was acquired, be deemed unpaid to the extent that the amount given for it by the owner, whether in money or in property, was less than its face value. On the contrary, the statute itself imposes no express restriction upon the disposition by a corporation of its stock except such as is imposed upon individuals, and prescribes no rule in respect to the liability of a stockholder to creditors except that when corporate property cannot be found to pay a judgment creditor, his private property may be seized under the execution to the extent of any unpaid instalments on the stock owned by him. Whether any such indebtedness really exists upon the part of a particular stockholder, and whether he in law or in fact owes any sum on the stock held by him, was left by the statute to be determined in each case, upon its own circumstances, and in accordance with the principles of general law touching the rights and liabilities of creditors and stockholders. If the legislature had intended that the acquisition of stock at less than its face value should be conclusive evidence in every case that the stock, as between creditors and stockholders, is "unpaid," it would have been easy to so declare, as has been done in some of the States. If such a rule be demanded by considerations of public policy, the remedy is with the legislative department of the government creating the corporation. A rule so explicit and unbending could be enforced without injustice to any one, for all would have notice from the statute of the will of the legislature. It is not for the courts by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation. If, when receiving the 910 shares of stock in payment of his portion of the claim of $70,000 against the railroad company, Greene had supposed

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that he would thereby become liable to account to creditors for its full face value without regard to the real value of the stock, and whether the corporation subsequently became bankrupt or not, he certainly would not have taken it. It is equally certain that no such result was contemplated by the other party to the settlement. It is also certain that the acceptance by the members of the Construction Company of worthless stock in full discharge of its claim was a benefit to both the existing creditors and the holders of stock of the railroad company not paid in full: to creditors, because it diminished the number of that class who would be entitled to share in the assets of the company; to stockholders so situated, because it lessened the number of creditors, to whom, in any contingency, they would be liable in their private property for the debts of the corporation. Here was a corporation which, at the time of the settlement of 1872 with Greene and his associates, was unable from its net earnings to pay the interest on its bonded debt. It could not pay even its floating debt without borrowing money or making sale of stock. But its stock could not be sold for money. It had no market value, and the company could not get rid of the debt due for construction except by borrowing money or selling stock. If it had borrowed money and secured its payment by mortgage upon its real property or income, it would thereby have added to the burdens of creditors and original stockholders. So far as the record discloses, it did in good faith what was best for all then concerned in the railroad company, namely, paid off a large claim for construction with worthless stock, those to whom it was issued taking their chances that it might at a future time acquire some value, but with the certainty that if the railroad company became bankrupt and ceased to do business all of its assets would be appropriated by creditors, leaving nothing whatever to stockholders.

Do the decisions of this court require us to hold, in such a case, that a creditor taking stock in payment of his claim is bound to other creditors for the face value of the stock? The plaintiff contends that our decisions are to that effect. Let us see. In *Sawyer* v. *Hoag*, 17 Wall. 610, 620, it was held

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that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund *sub modo* for the benefit of its general creditors. And this principle was reaffirmed in *Upton, Assignee*, v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton, Assignee*, 91 U. S. 56; *Webster* v. *Upton, Assignee*, 91 U. S. 65; *Pullman* v. *Upton*, 96 U. S. 328; *Chubb* v. *Upton*, 95 U. S. 665; *Morgan County* v. *Allen*, 103 U. S. 498; *Scovill* v. *Thayer*, 105 U. S. 143; *Hawkins* v. *Glenn*, 131 U. S. 319, 335; and *Richardson* v. *Green*, 133 U. S. 30, 45. There is no dispute here as to the soundness of this general principle. The dispute is as to its application to a case like the present one. We can be aided in solving this inquiry by ascertaining the character of the particular cases in which it has been applied by this court. In *Sawyer* v. *Hoag*, a subscription of $5000 to the stock of an insurance company for which the subscriber paid in full, but received in return the check of the corporation for $4250 under an agreement that the debt for the stock should be extinguished, and the amount of the check should be treated simply as a loan of money to the stockholder, was held to be a mere device to evade the rule that unpaid subscriptions of stock constitute a trust fund for the benefit of the creditors of the corporation; consequently, that the stock there in question was to be regarded, as between the corporation and creditors, to be unpaid to the extent of the amount received back from the corporation under the pretence of a loan. In *Upton, Assignee*, v. *Tribilcock*, an actual subscriber to the stock of an insurance company upon which he agreed to pay 20 per cent, was held responsible for the balance, and could not escape liability therefor because of representations by the agent, at the time of the subscription, that he would be only responsible for that amount, or by proving a subsequent arrangement with the company cancelling the subscription, and accepting, as in full payment, his note for the 20 per cent agreed to be paid. *Sanger* v. *Upton, Assignee*, was another case of the actual subscription of stock upon which the subscriber was held to pay the full sum subscribed. In *Webster* v. *Upton, Assignee*, a person holding certificates of stock by transfer from the original subscriber, and standing

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upon the books of the corporation as a stockholder, was held liable for the balance due upon the stock, without proof of an "express" promise upon his part to pay. In *Chubb* v. *Upton*, the decision was that one receiving a certificate of stock for a certain number of shares, at a given sum per share, thereby became liable to pay the amount thereof when called upon by the corporation or its assignee in bankruptcy; and in *Pullman* v. *Upton*, that a transferee of stock who caused the transfer to be made to himself as collateral security for a debt of the transferer, was liable for the balance due on such stock. The doctrine of the latter case was approved in *Hawkins* v. *Glenn*. In *County of Morgan* v. *Allen*, it was decided that the subscription by a county to the capital stock of a railroad company, together with the bonds given therefor, constituted with other property of the company a trust fund, to which all its creditors could rightfully look for satisfaction of their claims; and that by no device or combination, to which particular creditors were parties, could it withdraw its bonds from that fund, and thereby avoid liability to the general creditors of the company. In *Scovill* v. *Thayer*, it was declared, among other things, that a contract between a corporation and its stockholders, that they should never be called upon to pay any other assessment than that paid at the outset, while good as between the corporation and the stockholders, was a fraud in law upon creditors, which they could have set aside whenever their rights intervened, and their claims were unsatisfied. In *Richardson* v. *Green*, it was held that the issuing by a corporation of bonus stock was in violation of a statute of the State declaring it to be unlawful to issue certificates of stock until the shares were fully paid, and that one exercising the privileges and powers of a stockholder in a corporation was not exempt from the liabilities attaching to a *bona fide* stockholder who took shares purporting to be, but which in fact were not, fully paid.

This detailed statement of the above cases has been made because of the confident assertion that they rest upon doctrines necessarily requiring the reversal of the judgment. We do not concur in this view. In all of these cases, except one,

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there was an actual subscription of a given amount. They were cases of promises to pay the company the amount subscribed, not of sales by it. According to those cases, a stockholder, becoming such by formal subscription or by transfer upon the books of the corporation, cannot be discharged to the injury of creditors by any agreement, arrangement or device to which creditors do not give their assent, and by which the stockholder is to pay less than the amount due upon such stock; this, upon the ground stated in *Webster* v. *Upton, Assignee*, that "neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company," and that "the stock thus held in trust is the whole stock, not merely that percentage of it which has been called in and paid." The present case presents features that are not to be found in the others. It is not the case of an ordinary subscription of stock in a given amount. Nor is it, strictly, one of an ordinary purchase of stock for purposes of investment. It is the case of a creditor of an insolvent railroad corporation which, in consequence of its inability to pay creditors in money, was threatened with bankruptcy, and which refused or was unable to pay except in stock that was without market value. To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value — there being no statute forbidding such a transaction — without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property. We do not think the statute of Iowa can be properly construed to cause such a result in respect to corporations organized under its laws.

We must not be understood as modifying in any respect the principles laid down in the cases above cited, nor the salutary rule laid down in *Sawyer* v. *Hoag*, that when the interest of

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the public or of strangers is to be affected by any transaction between the stockholders owning the corporation and the corporation itself, "such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair toward such third person calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him." These principles were reaffirmed in *Richardson* v. *Green*, and should not be relaxed in any case in which they may be applied consistently with justice. So, when the interest of creditors require, those who hold shares of stock in a corporation, purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares in full, unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint. As said by this court in *Peters* v. *Bain*, 133 U. S. 670, 691, "unpaid subscriptions to stocks are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo*, in the sense that neither the stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned." See also *Graham* v. *Railroad Co.*, 102 U. S. 148, 161; *Wabash, St. Louis &c. Railway* v. *Ham*, 114 U. S. 587, 594; *Fogg* v. *Blair*, 133 U. S. 534, 541.

The general grounds upon which we have proceeded are supported by *New Albany* v. *Burke*, 11 Wall. 96, 103, *et seq.* In that case, a judgment creditor of an insolvent railroad corporation sought to hold the city of New Albany liable for the balance alleged to be due by it on a subscription to the capital stock of that corporation. Under an ordinance of the city, a subscription of $400,000, payable in city bonds, was made by it to the stock of the corporation, the railroad company agreeing that not more than $250,000 of the bonds should be called for until the road was completed to a certain place. Pursuant to the subscription, the city delivered to the company $200,000 of its bonds, payable to bearer. In consequence of its inability to obtain money on them, the company was unable

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to carry on the works, and abandoned the enterprise, after having pledged nearly all of the bonds received by it for money borrowed to prosecute it. Under those circumstances the company proposed to the city that if it would provide means for the payment of the sums borrowed, the bonds so pledged should be returned to the city and cancelled. If the bonds had been sold by the pledgees they would not have brought more than sufficient to pay the sums borrowed. The city accepted the proposition made to it upon the condition to which the railroad company acceded, that the latter would cancel the city's subscription and consent to the repeal of all ordinances relating thereto. The agreement was carried into effect, the city paying the sums for which the bonds were pledged, amounting to more than $36,000. All the bonds, except seven that had been sold, were returned to the city and cancelled, as was also the subscription of stock. One of the contentions of the judgment creditor was that this arrangement or compromise was fraudulent in law, because the capital stock of the corporation was a trust fund irrevocably pledged for the benefit of creditors, and that the corporation could not, when insolvent, give away its assets, or release its debtors without payment, or do any other act prejudicial to creditors. This court said: "There was no restriction in the contract upon the power of disposition, and none at law, or in equity, unless it be that the company could not part with the bonds in fraud of its stockholders or its creditors. And it had the right, which all other debtors had at the time, to make preferences among its creditors — to pay one rather than another. It is not to be disputed that, situated as the company was at the time when the contract of August and September, 1857, was made, with the debt of $36,000 pressing upon it, and with no other means of relief, it might have sold the entire lot of two hundred and forty-three bonds which it held, or was entitled to call for, at the best price that could have been obtained, and might have applied the entire proceeds, had they been needed, to pay that single debt. Of this, neither the stockholders nor the other creditors could have complained. . . . Time has revealed that the bonds were

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worth more than they could have been sold for, but we are to look at the circumstances as they were when the transaction took place, in considering what was its nature and whether it was legal. . . . Certainly it [the compromise] did not place the company in any worse position than it must have held had it not been made. . . . Besides, as we have seen, the arrangement assailed by the complainants was not a modification of the subscription previously made, or a bonus given for a release. It was rather a purchase of the city debt. We think it was not beyond the power of the contracting parties." Again, after observing that the arrangement made was binding upon the railroad company, through which, as well as against which, the judgment creditors claimed, the court said: "No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent, and might have been set aside by a court of equity. But certainly it was in the power of the directors to apply the subscription on bonds taken in payment to the extinguishment of debts, and, if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged. It is, therefore, a question of fact to be determined by the evidence, whether the bonds and the balance of the city's subscription were thus applied. . . . We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong the creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market." These principles have not been modified by any decision of this court, and they fully sustain the judgment in this case. And there is some support for the judgment in *Gelpcke* v. *Blake*, 19 Iowa, 263, 268, decided in 1865, in which a creditor of a railroad corporation sought to hold a stockholder liable on his subscription, notwithstanding his release by it. The court said: "Again, a release is a contract, and the articles of

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incorporation give to this company all the powers described in section 674 of the Code of 1851. The sixth clause of that section invests the company with power to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy. There was no lack of power, therefore, in this company, nor do we think there would have been in the board of directors, to rescind the contract with or without the consent of the stockholders or others, when it was done in good faith, and under the peculiar and equitable circumstances of the case." The clause in the Code of 1851, above referred to, was reproduced in the Revision of 1860, § 1151, and in the Code of 1873, § 1059.

It is, however, contended that the judgment cannot be sustained without disregarding later decisions of the Supreme Court of Iowa, which, it is insisted, rest upon the statute of that State, and are binding upon this court. Reliance is particularly placed by the plaintiff upon *Jackson* v. *Traer*, 64 Iowa, 469. All the cases in that learned court to which attention has been called were determined after Greene acquired the stock in question, and all, with one exception, after this litigation was commenced. The recognition in the Iowa statute of the right of creditors of corporations to look to unpaid instalments of stock subscriptions to obtain satisfaction of their demands did not confer a new right, but is a recognition of a right existing before the statute in virtue of the relations between a corporation and its creditors and stockholders. The new right given to the creditor by the statute is to have his execution, when corporate property cannot be found, levied upon the private property of the stockholder who is indebted on his subscription of stock; it being declared, out of abundant caution, that nothing in the statute "exempts" stockholders from individual liability to the amount of their unpaid instalments of stock. The decisions of the state court are not, therefore, to be regarded as resting upon the local statute, but only as expressing the views of that tribunal in respect to the same principles of general law announced by this court, after the fullest consideration, in the numerous cases to which we have adverted. The leading case in the state court upon this

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subject is *Jackson* v. *Traer*, above cited. It involved the liability of Greene's estate to another judgment creditor of the railroad company for the difference between the face value of his stock and the price at which it was received in payment of his claim. Upon the first hearing in the Supreme Court of the State, all its members except one held that the stock should be treated as fully paid. Upon a rehearing, at the October term, 1884 — some time after this action was brought and had been removed into the court below — three of the judges held that Greene's estate was bound to account to creditors for eighty per cent of the face value of the stock received by him. Chief Justice Rothrock and Judge Seevers dissented. The two cases since *Jackson* v. *Traer* — we allude to *Boulton Carbon Co.* v. *Mills*, 78 Iowa, 460, and *Tama Water Power Co.* v. *Hopkins*, 79 Iowa, 653 — do not rest upon any ground that is inconsistent with the views we have expressed. We cannot, consistently with our deliberate judgment upon this question of general law, accept the decision in *Jackson* v. *Traer* as controlling the determination of the present case. Upon questions of that character the federal courts administering justice in Iowa have equal and coördinate jurisdiction with the courts of that State, although they will lean "towards an agreement of views with the state court if the question seems to them balanced with doubt." *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 367; *Burgess* v. *Seligman*, 107 U. S. 20; *Pana* v. *Bowler*, 107 U. S. 529; *Hough* v. *Railway Co.*, 100 U. S. 213, 226; *Railroad Co.* v. *National Bank*, 102 U. S. 14, 30, 31; *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102, 109; *Carroll County* v. *Smith*, 111 U. S. 556; *Bolles* v. *Brimfield*, 120 U. S. 759. The judgment below, in our opinion, is in accordance with the law as it was adjudged to be when Greene received the stock in question and surrendered his claim upon the railroad company, and with the law as this court has since that time frequently declared it to be; and our duty is to so declare in the case before us. *Judgment affirmed.*

Mr. Justice Brown, not having been a member of the court when this case was argued, did not participate in its decision.

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FOGG *v.* BLAIR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 135. Argued January 6, 1891. — Decided March 2, 1891.

It is the settled doctrine of this court, as well as of the Supreme Court of Missouri, that unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of creditors, which may not be given away or disposed of by it, without consideration or fraudulently, to the prejudice of creditors.

While it is competent for a railroad corporation in Missouri, exercising good faith, to use its bonds and stock in payment for the construction of its road, it could not rightfully, at least, as against creditors or stockholders, issue its stock to contractors as full paid, without getting some fair or reasonable equivalent for it. What is such equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them. The corporation could not, by its directors, sell or dispose of its assets to the prejudice of creditors and stockholders, under such circumstances, on such terms, and at such prices as indicated, upon the face of the transaction, that they were being squandered recklessly or fraudulently in disregard of the trust committed to them.

In a suit brought against contractors for the construction of a railroad to hold them liable for the face value of stock received by them, in payment for work done, the bill alleged that they got $12,000 in the company's first mortgage bonds, for each mile of constructed road, and, in addition, $850,000 in its stock, and that the mortgage bonds received by them were full and adequate compensation for the work; but there was no allegation as to the real value of the stock. *Held*, that the bill was bad on demurrer; that it should have shown that the stock was of some value; and that the general allegations that the arrangement was a "fraud," a "breach of trust," a "scheme," and "colorable," without stating the ultimate facts upon which they were based, were only allegations of conclusions of law, which the demurrer to the bill did not admit.

THE court stated the case as follows:

The appellant Fogg brought this suit to recover from the appellee Blair the amount of a judgment obtained by him

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against an insolvent railroad corporation. The general ground upon which it is sought to make the appellee liable is, that he holds stock of that corporation upon which he is alleged to owe more than is sufficient to discharge appellant's judgment against it.

The case was determined upon demurrer to the bill, which makes the following showing: The St. Louis and Keokuk Railroad Company, a corporation of Missouri created by an act approved February 10, 1857, was authorized to construct a railroad from some suitable point on the North Missouri Railroad, not exceeding thirty miles west of St. Charles in that State, by way of Louisiana, Hannibal, La Grange and Canton, to some point near the mouth of the Des Moines River on the northern boundary of Missouri. Between January 1, 1867, and May 1, 1880, it located its line between Gilmore about nineteen miles west of St. Charles and Alexandria at the mouth of that river, running in a northerly direction through St. Charles County to Lincoln County by the way of Troy to a point near Prairieville, a distance of thirty-eight miles. It was also located from the Fair Grounds near Hannibal by the way of New London to Frankfort in Pike County. The road between the two places last named, a distance of eighteen miles, was completed and a large amount of grading was done in Lincoln County on the line located. The sum of $300,000 was expended in grading in that county. In the progress of the work the company became indebted in large amounts to a considerable number of persons, the plaintiff Fogg among the number.

On the 22d of September, 1870, Fogg and the railroad company had a final settlement of their respective claims, showing due him the sum of $9547.75 for labor done and money furnished in the location and construction of the railroad.

Subsequently, June 3, 1872, nearly all of the stockholders and directors, and all of the executive officers, of the St. Louis and Keokuk Railroad Company entered into articles of association, and organized under the General Statutes of Missouri a new corporation named the St. Louis, Hannibal and Keokuk Railroad Company, with a capital stock of $6,000,000 divided

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into 60,000 shares of $100 each, for the purpose of building a railroad between the points named in the charter of the St. Louis and Keokuk Railroad Company, and over most of the same ground upon which the latter company located and graded its road as above stated.

On the 3d of March, 1873, the St. Louis and Keokuk Railroad Company, by deed, assigned and transferred to the St. Louis, Hannibal and Keokuk Railroad Company its entire line of railroad, completed as well as unfinished, together with all its property of every kind and nature, without paying the plaintiff's debt or said other debts, and by such assignment and transfer rendered itself incapable of doing so. But in such deed it expressly stipulated and required the St. Louis, Hannibal and Keokuk Railroad Company to assume the said debts, including the plaintiff's, and the latter company did expressly assume and agree with the other company to pay the above debts of plaintiff and others. The St. Louis, Hannibal and Keokuk Railroad Company took possession of the railroad and all the property so assigned and transferred to it, and there was no other consideration for the assignment and transfer than its assumption of the above debts.

In an action at law brought by the plaintiff, September 22, 1880, in the court below, against the two companies, it was held that he could not recover against the St. Louis, Hannibal and Keokuk Railroad Company the amount of his claim. Thereupon that action was dismissed as to that company; and at a second trial the plaintiff obtained judgment against the St. Louis and Keokuk Railroad Company for $16,496.06 and costs, upon which execution was issued and returned no property found. Afterwards, on the 5th of May, 1884, in a suit in equity in the court below, the plaintiff recovered a judgment against both companies for the full amount of his judgment, with interest and costs.

On the 24th of February, 1881, the defendant Blair, a citizen of New Jersey, and Moses Taylor entered into a written contract with the St. Louis, Hannibal and Keokuk Railroad Company for the grading of its road, or so much thereof as remained ungraded between the south line of Pike County near Prairie-

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ville, and some point on the Wabash, St. Louis and Pacific Railroad between Wentzville and Peruque, for the building of bridges thereon, and for furnishing therefor all the materials, including the ties and rails, for the tracks of the road; the work to be completed and finished on or before the 31st of December, 1881, and to be equal in construction and materials to the part of the road then completed. In consideration of the work so to be done the company covenanted and agreed to pay and deliver to Blair and Taylor first mortgage bonds of the company equal to the sum of $12,000 for each mile of constructed road, and $850,000 par value of the capital stock of the company, in full payment for the construction of said part of its road.

In pursuance of that contract, Blair and Taylor constructed and completed such part of the road on or about July 15, 1882, making connection with the Wabash, St. Louis and Pacific Railroad, at Gilmore, a length of thirty-eight miles of main track and two miles of side track, receiving from the railroad company its first mortgage bonds to the amount of $480,000 (equal to $12,000 per mile of main and side tracks) and a certificate, each, for 4250 shares of its full paid stock of the par value of $425,000. It is alleged in the bill that the work done by them "was not worth more than $12,000 per mile;" that the first mortgage bonds delivered to them constituted "a full and adequate consideration for all the work done on said part of said railroad by said Blair and Taylor under said contract;" that the issuing and delivery "of said certificates for said 4250 full paid shares each in the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company to said Blair and Taylor, as aforesaid, was without any valuable consideration paid or moving from said Blair and Taylor or either of them to said railroad company, and there was no consideration for said stock and the agreement on the part of said St. Louis, Hannibal and Keokuk Railroad Company;" that "the agreement on the part of the said St. Louis, Hannibal and Keokuk Railroad Company to issue and deliver to said Blair and Taylor shares in its capital stock to the amount of $850,000, pretendingly in part payment for the completion of said part of said

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railroad between the south line of Pike County, Missouri, near Prairieville in said county, and Gilmore on the Wabash, St. Louis and Pacific Railroad, as aforesaid, was only colorable and was a scheme on the part of said Blair and Taylor to get said stock without paying therefor, and it was a fraud upon your orator and other creditors of said St. Louis, Hannibal and Keokuk Railroad Company," and "the making of said contract and issue and delivery by the directors and officers of the St. Louis, Hannibal and Keokuk Railroad Company of said certificates for said 4250 shares each of full-paid stock in the capital stock of said company to said Blair and Taylor without receiving the par value thereof either in money or work was a breach of trust, of which said Blair and Taylor had full knowledge and notice;" that "the said stock in the hands of said Blair and Taylor was and is null and void as against your orator and other creditors of said St. Louis, Hannibal and Keokuk Railroad Company;" and that by reason of the premises Blair still owes that company the sum of $425,000 for the 4250 shares of its stock delivered to him as aforesaid.

It further appears from the bill that in a suit to foreclose a deed of trust executed August 1, 1877, by the St. Louis, Hannibal and Keokuk Railroad Company to secure the payment of certain bonds, in which suit the present plaintiff was a defendant, the railroad and all the property appurtenant thereto were sold and purchased by John I. Blair for the sum of $370,000, which amount was not sufficient to pay the bonds secured by the deed of trust. In that suit Fogg's judgment, then amounting to $18,365.11 and costs, was adjudged to be junior and inferior to the lien of the deed of trust. 25 Fed. Rep. 684; 27 Fed. Rep. 176; *Fogg* v. *Blair*, 133 U. S. 534.

The St. Louis and Keokuk Railroad Company and the St. Louis, Hannibal and Keokuk Railroad Company are both insolvent. The latter company has no officers and keeps no office; and the foreclosure and sale of its property has practically dissolved it as a corporation; and John I. Blair is the only stockholder of that company whose stock is known to the plaintiff to be unpaid, and who is within the jurisdiction of the court below.

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The plaintiff, proceeding in his present bill on the ground that the stock of the St. Louis, Hannibal and Keokuk Railroad Company is a trust fund for the payment of its debts, prays that the certificate to Blair of 4250 shares of full-paid stock be cancelled, and that he be decreed to pay to the plaintiff the full amount of his decree against that company, and also the full amount of the judgment, interest and costs, of such other unsatisfied judgment creditors of that company as shall come in and contribute to the expenses of this suit in proportion to their respective demands; and that the plaintiff and other unsatisfied judgment creditors of the St. Louis, Hannibal and Keokuk Railroad Company have such relief as may be equitable.

Mr. James Carr for appellant.

The capital stock of a corporation is a trust fund for the payment of its creditors. *Sawyer* v. *Hoag*, 17 Wall. 610; *Upton* v. *Tribilcock*, 91 U. S. 45; *Sawyer* v. *Upton, Assignee*, 91 U. S. 56; *County of Morgan* v. *Allen*, 103 U. S. 498; *Jackson* v. *Traer*, 64 Iowa, 469. The directors of a corporation are trustees of its capital stock, with all the duties and obligations of trustees resting on them; and in the management of capital stock they are bound to exercise sound judgment, integrity and good faith in disposing of it. *Jackson* v. *Ludeling*, 21 Wall. 616; *Upton* v. *Tribilcock*, 91 U. S. 45; *Bouton* v. *Dement*, 123 Illinois, 142.

Capital stock, being a trust fund, may be followed by creditors in a court of equity, into the hands of every person who is not a *bona fide* purchaser thereof for value without notice, and such persons held as trustees to the extent of the trust fund in their hands. *Sanger* v. *Upton*, 91 U. S. 56; *Wood* v. *Dummer*, 3 Mason, 308, 312; *Curran* v. *Arkansas*, 15 How. 304; *Taylor* v. *Bowker*, 111 U. S. 110. John I. Blair and Moses Taylor were the original takers of the stock in question. Hence the doctrine of *bona fide* purchaser for value without notice does not apply to the facts of this case.

Parties contracting with a corporation are bound to take

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notice of its capacity to contract. *Davis* v. *Old Colony Railroad*, 131 Mass. 258. Neither is a simulated payment of stock valid as against creditors. *Sawyer* v. *Hoag*, 17 Wall. 610; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501.

The directors of a corporation have no power to release a subscriber to its capital stock to the prejudice of its creditors. *Burke* v. *Smith*, 16 Wall. 390; *Rider* v. *Morrison*, 54 Maryland, 429; *Bedford Railroad Co.* v. *Bowser*, 48 Penn. St. 29, 37.

An agreement between a corporation and its stockholders that the stock shall be considered full paid and non-assessable upon the payment of a certain per cent of its par value is binding on the corporation and estops it from making any further calls on the stockholders. But if the corporation shall become insolvent, such agreement does not estop unsatisfied judgment creditors of the corporation from subjecting the unpaid balance on the stock to the payment of their judgments. *Upton, Assignee* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; *Hawley* v. *Upton*, 102 U. S. 314; *Scovill* v. *Thayer*, 105 U. S. 143.

A sale of a railroad far below its value under a foreclosure decree obtained by virtue of a collusive agreement between the directors of the company seeking to escape liability as indorsers therefor, and the purchasers, is not binding on the creditors, and such sale will be set aside and held for naught and the purchasers held as trustees for the creditors of the company for the full value of the property, less the sum which the purchasers actually paid for a large lien claim and not for the nominal amount, they having bought it at a large discount. *Drury* v. *Cross*, 7 Wall. 299; *Jackson* v. *Ludeling*, 21 Wall. 616.

It may be conceded for the purposes of this case, that the stock in question could be paid for in work; but when the rights of creditors intervene, the payment can only be made in work at a reasonable price. The stockholder is not legally entitled to a credit of $1000 on his stock when he only does $500 worth of work. And as contracts to pay for stock in work are frequently made to get the stock for nothing, or at

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least without paying par value therefor, and thereby cover up a fraud on *bona fide* stockholders and creditors of the corporation, they should be scrutinized by the courts with great care. *Jackson* v. *Traer*, 64 Iowa, 469; *Chouteau* v. *Dean*, 7 Missouri App. 210; *Moss* v. *King*, 42 Iowa, 478; *Boynton* v. *Hatch*, 47 N. Y. 225.

Mr. Walter C. Larned for appellee.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

It is the settled doctrine of this court, as well as of the Supreme Court of Missouri, that unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of its creditors, which may not be given away or disposed of by it, without consideration or fraudulently, to the prejudice of such creditors. *New Albany* v. *Burke*, 11 Wall. 96, 106; *Sawyer* v. *Hoag*, 17 Wall. 610, 620; *Upton, Assignee* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton, Assignee*, 91 U. S. 56; *Webster* v. *Upton, Assignee*, 91 U. S. 65; *County of Morgan* v. *Allen*, 103 U. S. 498, 509; *Scovill* v. *Thayer*, 105 U. S. 143, 154; *Hawkins* v. *Glenn*, 131 U. S. 319, 335; *Richardson* v. *Green*, 133 U. S. 30, 45; *Peters* v. *Bain*, 133 U. S. 670, 691; *Clark* v. *Bever*, *ante*, 96; *Liebke* v. *Knapp*, 79 Missouri, 22, 24. And this principle of general law is reinforced in Missouri —where the transaction in question occurred, and by whose laws the railroad corporations mentioned in the bill were created — by a statute giving a judgment creditor of a corporation, where corporate property cannot be found upon which to levy his execution, the right to an execution against a stockholder "to the extent of the amount of the unpaid balance of such stock by him or her owned." 1 Rev. Stats. Missouri, 1879, p. 121, c. 21, § 736; Ib. 1889, § 2517.

While it was competent for the St. Louis, Hannibal and Keokuk Railroad Company, exercising good faith, to use its bonds and stock in payment for the construction of its road, it could not rightfully, at least as against creditors or stock-

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holders, issue its stock to Blair and Taylor as full paid without getting some fair or reasonable equivalent for it. What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them. The principles which, by established law, govern the relations between a corporation and its creditors and stockholders, and the management of the corporate property, would be of little value, if the corporation, by its directors, could sell or dispose of its assets to the prejudice of creditors and stockholders under such circumstances, on such terms and at such prices as indicated, upon the face of the transaction, that they were being squandered recklessly or fraudulently in disregard of the trust committed to them. For such violations of trust the courts furnish ample remedy, independently of any statute prescribing a special mode for enforcing the liability of stockholders for the balance due upon stock held by them purporting to be, but which is not, full paid. Is the plaintiff entitled to relief under any proper application of these principles?

It is averred in the bill, and the demurrer admitted, for the purposes of the hearing below, that full and adequate compensation for the work done by Blair and Taylor was $12,000 per mile in the company's first mortgage bonds. Assuming this to be true, if the stock issued to Blair and Taylor was of any considerable value at the time they received it, or if the circumstances attending its delivery to them indicated bad faith upon their part or upon the part of the corporation, different questions would arise from those now presented. But the bill contains no allegation whatever as to the real or market value of the stock. The court cannot say, from any facts set forth in the bill as to the condition of the railroads in question that the stock when delivered to the contractors was worth par, or that it had any substantial value. If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit

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upon the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court — assuming such facts to be true — to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized. He seems to have carefully avoided making any allegation as to the real or probable value of the stock, and to have supposed that the court, in the absence of averment or proof to the contrary, would assume that it was worth par, or had substantial value. As he impugned the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was "colorable," a "fraud," "a breach of trust," and a "scheme" by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit. *Dillon* v. *Barnard*, 21 Wall. 430, 437; *United States* v. *Ames*, 99 U. S. 35, 45; *Pullman Palace Car Co.* v. *Missouri Pacific Railway*, 115 U. S. 587, 596; *Ford* v. *Peering*, 1 Ves. Jun. 72, 77. It is consistent with the allegations of the bill that the stock was absolutely without value when issued to Blair and up to the time when the railroad and all the property appurtenant thereto was sold under the decree of foreclosure. The demurrer was properly sustained.

Decree affirmed.

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COVINGTON STOCK-YARDS COMPANY *v.* KEITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 33. Submitted October 22, 1890. — Decided March 2, 1891.

A railroad company, holding itself out as a carrier of live stock, is under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock that may be offered for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned.

The duty to receive such stock cannot be efficiently discharged, at least in a town or city, without the aid of inclosed yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public, while being loaded upon the cars in which they are to be transported. And the duty of the carrier to deliver cannot be safely and effectively performed except in and through inclosed yards or lots convenient to the place of unloading.

A carrier of live stock must be at all times in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. It cannot, in addition to the customary and legitimate charges for transportation, make, or allow any agent it employs to make a special charge for merely receiving or merely delivering such stock in and through yards provided for that purpose.

In respect to the mere loading and unloading of the stock at a particular city, the carrier is required by the nature of its employment to furnish such suitable and convenient appliances as are reasonably sufficient for the business at that place.

THE case is stated in the opinion.

Mr. E. D. Baxter for appellant.

No appearance for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 28th of January, 1886, George T. Bliss and Isaac E. Gates instituted in the court below a suit in equity against the Kentucky Central Railroad Company, a corporation of Ken-

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tucky, for the foreclosure of a mortgage or deed of trust given to secure the payment of bonds of that company for a large amount; in which suit a receiver was appointed who took possession of the railroad, with authority to operate it until the further order of the court.

The present proceeding was begun on the 18th of June, 1886, by a petition filed in the foreclosure suit by Charles W. Keith, who was engaged in buying and selling on commission, as well as on his own account, live stock brought to and shipped from the city of Covington, Kentucky, over the Kentucky Central Railroad. The petition proceeded upon the ground that unjust and illegal discrimination had been and was being made against Keith by the receiver acting under and pursuant to a written agreement made November 19, 1881, between the railroad company and the Covington Stock-Yards Company, a corporation created under the general laws of Kentucky; the yards of the latter company located in Covington, and connected with the railroad tracks in that city, being the only depot of the railway company that was provided with the necessary platforms and chutes for receiving or discharging live stock on and from its trains at that city. The petition alleged that Keith was the proprietor of certain live-stock lots and yards in that city immediately west of those belonging to the Covington Stock-Yards Company, and separated from them by only one street sixty feet in width; that he was provided with all the necessary means of receiving, feeding and caring for such stock as he purchased, or as might be consigned to him by others for sale; and that his lots and yards were used for that purpose subsequently to March 1, 1886, and until, by the direction of the receiver, the platforms connecting them with the railroad were torn up and rendered unfit for use. The prayer of the petitioner was for a rule against the receiver to show cause why he should not deliver to him at some convenient and suitable place outside of the lots or yards of the said Covington Stock-Yards Company free from other than the customary freight charges for transportation, all stock owned by or consigned to him and brought over said road to Covington.

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The receiver filed a response to the rule, and an order was entered giving leave to the Covington Stock-Yards Company to file an intervening petition against the railroad company and Keith, and requiring the latter parties to litigate between themselves the question of the validity of the above agreement of 1881. The Stock-Yards Company filed such a petition, claiming all the rights granted by the agreement referred to, and alleging that it had expended sixty thousand dollars in constructing depots, platforms and chutes, as required by that agreement.

Referring to that agreement it appears that the Stock-Yards Company stipulated that its yards on the line of the railroad in Covington should be maintained in good order, properly equipped with suitable fencing, feeding-pens and other customary conveniences for handling and caring for live stock, and to that end it would keep at hand a sufficient number of skilled workmen to perform the operations required of it, and generally to do such labor as is usually provided for in stock yards of the best class, namely, to load and unload and care for "in the best manner all live stock delivered to them by the party of the first part [the railroad company] at their own risk of damage while so doing, and in no event to charge more than sixty cents per car of full loads for loading and sixty cents per car for unloading, and no charges to be made for handling less than full loads, as per way-bills." The Stock-Yards Company also agreed to become liable for those charges, and to collect and pay over to the railroad company, as demanded from time to time, such money as came into its hands, the charges for feeding and caring for live stock not to be more than was charged for similar services and supplies at other stock yards of the country. The railroad company, upon its part, agreed to pay the Stock-Yards Company the above sums for loading and unloading and otherwise acting as its agent in the collection of freights and charges upon such business as was turned over to it by the railroad company; that it would require all cars loaded at yards for shipment South or East to be carefully bedded, which the Stock-Yards Company was to do at the rates usually charged in other yards; that it would

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make the yards of the Stock-Yards Company its "depot for delivery of all its live stock," during the term of the contract, and not build, "nor allow to be built, on its right of way, any other depot or yards for the reception of live stock." The delivery of stock in cars on switches or sidings provided for the purpose was to be considered a delivery of the stock to the Stock-Yards Company, which, from that time, was to be responsible for the stock to the railroad company. To protect the business of the Stock-Yards Company from damage in case the railroad extended its track over the Ohio River, the railroad company agreed that during the term of the contract the rate of freight from all points on its road and connections should "not be less than five dollars per car more to the Union Yards of Cincinnati than the rate to Covington yards from the same points;" that its business arrangements with any other railroad or transportation line should be subject to this agreement; and that the yards of the Stock-Yards Company "shall be the depot for all live stock received from its connections for Cincinnati or Eastern markets." The agreement by its terms was to remain in force for fifteen years.

In the progress of the cause E. W. Wilson, by consent of parties, was made a co-petitioner and co-respondent with Keith.

By the final decree it was found, ordered and decreed as follows: "It is the duty and legal obligation of the Kentucky Central Railroad Company, as a common carrier of live stock, to provide suitable and convenient means and facilities for receiving on board its cars all live stock offered for shipment over its road and its connections from the city of Covington, and for the discharge from its cars of all live stock brought over its road to the said city of Covington, free of any charge other than the customary transportation charges to consignors or consignees; and that the said petitioners, Keith and Wilson, live-stock dealers and brokers, doing business at the city of Covington, and proprietors of the Banner Stock-Yards at that place, are entitled to so ship and receive over said road such live stock without being subject to any such additional charges imposed by said receiver, said railroad company, or other person or corporation. The court further finds and decrees that

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the alleged contract entered into by and between the said railroad company and the said Covington Stock-Yards Company, of date the 19th day of November, 1881, does not entitle the said Stock-Yards Company to impose upon any shipper of live stock over said road, passing such stock through the yards of said company to and from the cars of said railroad company, any charge whatever for such passage. It is stipulated in said contract that said Stock-Yards Company shall establish and maintain suitable yards or pens for receiving, housing, feeding and caring for live stock, and to receive all such stock, and load and unload the same upon and from the cars of said company transported on or to be transported over said road for a compensation of sixty cents per car load, to be paid by said railroad company for and during the period of fifteen years from the date of said contract, which has not yet expired, while the said railroad company agreed that it would not during said period establish or allow to be established on the line of its road or on its right of way in said city of Covington any other platform or depot than that of said Stock-Yards Company for the receipt or delivery of such live stock. . . . The court doth further find that the general freight depot of the said railroad company in the said city of Covington, at the terminus of its road between Pike and Eighth Streets, is not a suitable or convenient place for the receipt and delivery of live stock brought to the said city or to be shipped therefrom over said road, and neither said railroad company nor said receiver having provided such suitable depot or place therefor, except the yards of said Stock-Yards Company, it is now ordered and decreed that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson at and through the said Covington stock yards all such live stock as may be brought to them or offered by them for shipment over said road and its connections, upon the consent of said stock yards, in writing, that it may be so done, being filed in this court and cause on or before the 1st day of January next after the entry of this decree, free of any charge for passing through said yards to and from the cars of said railroad company. In default of such consent

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being so filed, it is ordered and decreed that upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the live-stock switch of said railroad company north of said stock yards the said railroad company and said receiver shall receive and deliver all such live stock to said Keith & Wilson as shall be consigned to them or either of them or be offered by them or either of them for shipment at said platform. The said Keith & Wilson shall provide an agent or representative at said platform to receive such cattle as they may be notified by said railroad company or said receiver are to be delivered to them thereat, and they shall give the said railroad company or said receiver reasonable notice of any shipment desired to be made by them from said platform to conform to the departure of live-stock trains on said road."

The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But, it is contended, that the decree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, free from any charge other than the customary one for transportation, for merely passing into and through the yards of the Covington Stock-Yards Company to and from the cars of the railroad company. As the decree does not require such stock to be delivered in or through the yards of the appellant, except with its written consent filed in this cause; as such stock cannot be properly loaded upon or unloaded from cars within the limits of the city, except by means of inclosed lots or yards set apart for that purpose, and conveniently located, in or through which the stock may be received from the shipper or delivered to the consignee, with-

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out danger or inconvenience to the public in the vicinity of the place of shipment or discharge; and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company, the contention just adverted to, is, in effect, that the carrier may, without a special contract for that purpose, require the shipper or consignee, in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent.

When animals are offered to a carrier of live stock to be transported it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

A railroad company, it is true, is not a carrier of live stock with all the responsibilities that attend it as a carrier of goods. *North Penn. Railroad* v. *Commercial Bank*, 123 U. S. 727, 734. There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arise from the nature of the particular property transported. "But," this court said, in the case just cited, "notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes

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subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced."[1] The same principle necessarily applies to the receiving of live stock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company

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[1] *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102, 107; *Hall & Co.* v. *Renfro*, 3 Met. (Ky.) 51, 54; *Mynard* v. *Syracuse & Binghamton Railroad*, 71 N. Y. 180; *Smith* v. *New Haven & Northampton Railroad*, 12 Allen, 531, 533; *Kimball* v. *Rutland & Burlington Railroad*, 26 Vermont, 247; *South & North Alabama Railroad Company* v. *Henlein*, 52 Alabama, 606, 613; *Wilson* v. *Hamilton*, 4 Ohio St. 722, 740; *Ayres* v. *Chicago & Northwestern Railroad*, 71 Wisconsin, 372, 379, 381; *McCoy* v. *K. & D. M. R. Co.*, 44 Iowa, 424, 426; *Maslin* v. *B. & O. R. R. Co.*, 14 W. Va. 180, 188; *St. Louis & Southeastern Railway* v. *Dorman*, 72 Illinois, 504; *Moulton* v. *St. Paul, Minneapolis &c. Railway*, 31 Minnesota, 85, 87; *Kansas Pacific Railway* v. *Nichols*, 9 Kansas, 235, 248; *Clarke* v. *Rochester & Syracuse Railroad*, 14 N. Y. 570, 573; *Palmer* v. *Grand Junction Railway*, 4 M. & W. 749.

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with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

We must not be understood as holding that the railroad company, in this case, was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling or shipping live stock, chose to establish stock yards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellee had been permitted to use them, without extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any

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other compensation than the customary charges for transportation.

Decree affirmed.

GUARANTY TRUST AND SAFE DEPOSIT COMPANY v. GREEN COVE SPRINGS AND MELROSE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 155. Submitted January 21, 1891. — Decided March 2, 1891.

Limitations upon the power of a trustee in a railroad mortgage to take proceedings to enforce payment of the amount secured should be construed strictly.

A provision in a mortgage that the mode of sale provided by it "shall be exclusive of all others" is an attempt to provide against a remedy in the ordinary course of judicial proceedings and oust the jurisdiction of the courts, and is therefore invalid.

A provision in a statute authorizing notice to be given to an absent defendant to appear, by publishing the same in a newspaper once a week for four months, is not satisfied by a publication once a week for four lunar months; but the word "month" when so used signifies a calendar month.

To support a decree for foreclosure against an absent defendant brought in by publication, publication for the full period required is necessary.

Cooper v. *Reynolds*, 10 Wall. 308, distinguished.

THIS was an appeal from a decree of the Circuit Court for the Northern District of Florida dismissing a bill of foreclosure filed by the appellant to which the Green Cove Springs and Melrose Railroad Company, the Western Railway Company, the Green Cove Springs and Midland Railroad Company, and a number of other individual defendants were made parties. The mortgage or deed of trust was made June 20, 1882, by the Green Cove Springs and Melrose Railroad Company to the plaintiff to secure its bonds, and the bill averred $25,000 of such bonds to be outstanding and unpaid, and also contained the usual allegations with regard to the non-payment of interest coupons. The bill further averred, in substance, that the company had lost possession of its road and

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other property, which was in the possession of and operated by other parties under a pretended sale made August 3, 1885, in pursuance of certain judicial proceedings in the Circuit Court of Clay County, Florida, but claimed that notwithstanding such sale, its lien under the mortgage was not discharged or extinguished. These proceedings were instituted by certain persons composing the firm of Budington, Wilson & Co., who, on July 25, 1884, began a suit in equity in the Circuit Court for Clay County against such railroad company and one Canova, in which the plaintiff, the Trust and Safe Deposit Company, was also mentioned in the stating part of such bill as defendant. It appeared that such suit was begun to enforce a statutory lien for work and labor; that there was no prayer for a foreclosure of plaintiff's deed of trust, nor other relief against the grantee in said deed; nor was any case stated in hostility to the deed or the lien thereunder. It was further alleged that an attempt was made to serve the grantee in the deed by a publication of a notice in accordance with the statute of Florida in the case of a non-resident defendant, but that such statute was not complied with; that no notice was ever served upon the plaintiff, either by publication or otherwise, and the court had no jurisdiction of the person of the plaintiff in such suit, and the sale thereunder was null and void; that at no time before or at the commencement of the publication of the order to appear, nor at any time during the publication of said order, did the state court take possession of said road, or of any of its property by attachment, receiver or other process made or issued in said suit; that on January 16, 1885, a decree *pro confesso* was entered for want of the appearance of plaintiffs therein; that on March 11, 1885, the firm of Budington & Wilson, a distinct and separate firm from Budington, Wilson & Company, and one Osias A. Budington, intervened in said suit by petition, and alleged a new and distinct cause of action against the defendant railroad company, not stated in the original bill of complaint, namely, a statutory lien for labor performed for the sum of $1700, and said Budington also averred that he had recovered a judgment against said company for the sum of $1012.50, and they prayed for leave

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to prove their claims in said suit. But neither of the said intervenors prayed any relief against the grantee in the deed of trust, nor did either of them, nor did any person in their behalf, serve or attempt to serve any notice on said grantee of the filing of said petition, nor the claims therein asserted. It was further alleged that on the 12th of November, 1884, the several parties who had appeared in the said suit entered into an agreement for a sale of the road, which took place on August 3, 1885; the defendant Greely becoming the purchaser as trustee for himself and all others who had filed claims or demands against said company, for the sum of $20,000: and that subsequently, and under an agreement of the various creditors of the road who had transferred their claims to Greely, consenting that he should organize a new company, he executed a lease of the road to a corporation known as the Western Railway Company, by which it was agreed that such company should pay by way of rent eight per cent per annum upon a valuation of $30,000, for five years. The bill further charged that "the feeble defence and supineness and indifference to the interests of the said bondholders on the part of the said Green Cove Springs and Melrose Railroad Company, its directors and officers, as shown by the said judicial proceedings in said state court, if the same was intended to affect and destroy the lien of said deed of trust, was and is a fraud upon the rights of the said trustee and said bondholders;" that the sale and subsequent proceedings were fraudulent, and should be vacated and set aside; "that said company, grantor in said deed of trust, in effect consented to a sale of said road to pay simple contract debts and demands, which were not a lien upon its property paramount to said lien created by said deed of trust, and many of which had not been reduced to judgment:" that every lien for work and labor performed was declared by the decree of the court in favor of persons who were not parties to the original bill of Budington, Wilson & Co., but who had come into said cause long subsequent to the decree *pro confesso*, and asserted their claims thereafter, of which said grantee and bondholders had no knowledge whatever: that the aggregate amount of the said statutory liens so

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found to exist was less than $700; that no time for redemption was allowed, but on the contrary "a decree of sale was made before the indebtedness claimed to be due was ascertained, whereby no party in interest was given any time or opportunity to redeem or pay said indebtedness." The bill prayed for a receiver and injunction against the transfer or encumbering of the road; a decree of foreclosure of the deed of trust; and for a decree declaring the sale under the judicial proceedings in the state court to be null and void, as against the plaintiff and the *bona fide* holders of any of its bonds.

Two answers were filed to the bill, which presented three distinct defences. First, that the mortgage or deed of trust required that 60 per cent in value of the outstanding bondholders should request the trustee in writing to initiate proceedings, and that no such request was alleged in the bill. Second, that plaintiff herein, the Guaranty Trust and Safe Deposit Company, was a party defendant to the proceedings in the state court, was bound by the decree and sale in that court, and that such sale extinguished the lien of the mortgage sought to be enforced in this suit. Third, that there were no bonds of the railroad company which executed the mortgage to the plaintiff legally outstanding, and consequently it had not sufficient interest or title to maintain its suit. A decree was entered in the Circuit Court dismissing the bill, but no opinion appears to have been delivered or filed.

Mr. H. Bisbee for appellant.

Mr. J. C. Cooper for appellees.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

1. The answer of Philip J. Canova raises an objection to the maintenance of this bill in the fact that sixty per cent in value of the bondholders had not requested action upon the part of the trustee, as required by the trust deed, which, in covenant numbered second, provides in substance that, in case of default

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after demand made, for a period exceeding twelve months, to pay the semi-annual interest upon the bonds, or for a period exceeding six months to pay the principal of such bonds, "it shall be the duty of the said trustees for the time being, and they shall or will, upon written request of the holders of sixty per centum of the said bonds then outstanding, enter upon and take possession of the said railroad property and estate," and operate the same, appropriating the net income to the best advantage, etc., "or the said trustee shall and will, after or without entering upon or taking such possession, upon the written request of the holders of bonds of a like amount, proceed upon and under this indenture of mortgage to sell the railroad property and estate, . . . at public sale, in the city of Philadelphia, first giving at least four weeks' notice by publication, etc.," and grant and convey the same to the purchaser, freed from all and every trust hereby created, etc."

As there is no averment in the bill that sixty per cent of the owners of the outstanding bonds had requested action on the part of the trustee, it is insisted that these proceedings were instituted without authority, and the case of *Chicago &c. Railroad Co.* v. *Fosdick*, 106 U. S. 47, 77, is claimed to be decisive of this question. In that case, which was a bill for foreclosure, the proviso was that the trustee, upon the written request of the holders of a majority of the bonds then outstanding, should proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as therein provided. It was argued that the office of this clause was merely to make the obligation of the trustees imperative instead of optional, but the court held that the whole article must be taken together as a unit, and "the nature of the provision and the character of its object must be taken into consideration as furnishing the rule of its interpretation." It will be observed, however, that the proviso was directed against the very proceeding taken by the trustee in the suit, namely, a foreclosure and sale of the property; while in the present case it is directed only to a taking possession, or a sale *under the deed of trust* without the institution of legal proceedings.

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A case nearer in point is that of *Morgan's Steamship Co.* v. *Texas Central Railway*, 137 U. S. 171, decided at the present term, in which the condition was that on default continuing for sixty days in the payment of interest or any part of principal, the principal of the bonds should become immediately due, and that upon request of seventy-five per cent of the holders of bonds, and written notice of the same, the trustee should take possession of the property, and operate it for the benefit of the bondholders, and that upon like request he should proceed to foreclose the mortgage and sell the property to the highest bidder for cash. It was also provided that nothing contained in the instrument should be construed to prevent or interfere with the foreclosure by any court of competent jurisdiction. It was held that the trustee could maintain a bill to foreclose the mortgage upon occurrence of a default, without averring or proving a request of seventy-five per cent of the bondholders, as such request was necessary only in case the trustee wished to proceed to foreclose or take possession *ex mero motu* without the intervention of a court.

We think that such limitations upon the power of the trustee to take legal proceedings to enforce payment of the amount secured, should be strictly construed. In this case, the condition only relates to the taking possession of the property under the deed of trust, or to a sale in the city of Philadelphia, under the power of sale contained therein, and we think it should not be held to apply to foreclosure proceedings begun in a court of competent jurisdiction to obtain a judicial sale of the property. This was the ruling in the Eighth Circuit, by Judge Dillon in *Alexander* v. *Central Railroad of Iowa*, 3 Dillon, 487; and by Judge Caldwell in *Credit Co.* v. *Arkansas Central Railroad Company*, 15 Fed. Rep. 46; and we think it is sound.

It is true there is a subsequent provision in the deed of trust to the effect that neither the whole nor any part of the premises mortgaged shall be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the bonds, it being the intention and agreement of the parties that the mode of sale provided by the mortgage "shall be exclusive

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of all others." This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority, cannot be done. *Hope* v. *International Society*, 4 Ch. D. 327; *Edwards* v. *Aberayron Ins. Society*, 1 Q. B. D. 563; *Horton* v. *Sayer*, 4 H. & N. 643; *Scott* v. *Avery*, 8 Exch. 487; *S. C.* 5 H. L. Cas. 811; *Thompson* v. *Charnock*, 8 T. R. 139; *Mitchell* v. *Harris*, 2 Ves. Jun. 129; *Tobey* v. *County of Bristol*, 3 Story, 800; *Noyes* v. *Marsh*, 123 Mass. 286; *King* v. *Howard*, 27 Missouri, 21; *Conner* v. *Drake*, 1 Ohio St. 166; *Trott* v. *City Ins. Co.*, 1 Cliff. 439; 2 Story Eq. § 1457.

Again; it is evident that this was a condition for the benefit of the grantor and its assigns, and that intervening lien holders, and those who have purchased the property under decrees in their favor, do not stand in a position to take advantage of this covenant. The sole object of the covenant was to protect the mortgagor against a seizure and sale of its property for non-payment of interest or principal at the mere caprice of the trustee, or without the consent of a majority of the bondholders, and it has no application to a case where the mortgagors have already lost the property under adverse proceedings instituted by parties having no connection with the mortgage.

2. The validity of the sale in the state court is attacked upon the ground that proper notice of the proceedings was not given to the plaintiff in this case, as required by the Florida statute, which provides, in substance, that non-resident defendants may be required to appear, if residing within the United States, within four months, by a publication to be made *once a week* for the *four months*. The facts with regard to the publication in this case are as follows: On February 23, 1884, Philip J. Canova filed a bill in the state court against the Green Cove Springs and Melrose Railroad Company. The gravamen of the bill was that the company owed Canova over $19,000 as contractor, and that he had a lien as such contractor superior to the lien of the bonds secured by the mortgage to the plaintiff in this case. Plaintiff was not named a

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defendant in that bill. On the day the bill was filed the state court appointed a receiver of the property.

In the latter part of July, 1884, Budington, Wilson & Company filed a bill in the same court against the Green Cove Springs and Melrose Railroad Company, Philip J. Canova, the Chester Construction Company and the Guaranty Trust and Safe Deposit Company, plaintiff in this suit, to recover for labor in building the road, and to enforce the payment of certain of these bonds deposited with it as collateral security. On the 6th of February, 1885, these two suits in the state court were, by order of that court, consolidated, and thereafter proceeded as one suit. Before this consolidation was effected, however, and on July 29, 1884, the court made an order that the Trust and Safe Deposit Company appear and answer the bill of complaint on or before the first Monday of December, 1884, "otherwise the complainants' said bill shall be taken *pro confesso*." It was further ordered that this order "be published once a week for four months in some paper published in Clay County, Florida." The only evidence of publication appears from the affidavit of H. E. Bemis, the business manager of the "Springs," a newspaper published in the town of Green Cove Springs, that the foregoing notice "was duly published in the said newspaper for nineteen consecutive weeks prior to this date, to the best of his knowledge and belief." This affidavit was made and subscribed the 15th day of December, 1884. The testimony further established that the newspaper was published on Saturday of each week, and as the manager swears that it was published for nineteen consecutive weeks prior to this date, the last publication must have been upon Saturday, December 13, and the first publication on the 9th of August. The notice, however, required the absent defendants to appear and answer the bill on or before the first Monday in December, which was the first day of the month; hence, there could have been only seventeen publications, including the first on the 9th of August, before the day the defendants were required to answer, and from this day to the first Monday of December would be only 114 days, more than four *lunar* months, but eight days less than four *calendar* months, before the first of December.

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The regularity of the proceedings then resolves itself into the question whether the provision that publication shall be made once a week for four months is satisfied by a publication for sixteen weeks or four lunar months. We think it is not. It is the settled law both of this court, and of the Supreme Court of Florida, that the word "month," when used in contracts or statutes, must be construed, where the parties have not themselves given to it a definition, and there is no legislative provision on the subject, to mean calendar and not lunar months. In *Sheets* v. *Selden's Lessee*, 2 Wall. 177, it was applied to proceedings for the forfeiture of a lease. It was contended in that case that in the absence of any legislative provision on the subject, the term must be construed to mean lunar and not calendar months, in accordance with the English rule, but it was held that the term was not technical, that it must be construed in its ordinary and general sense, and that in this sense calendar months are always understood. In *Bacon* v. *State*, 22 Florida, 46, it was applied to the limitation by law of the time for presenting a bill of exceptions to the judge for allowance, the court holding that where the term month is used in an order of this kind, and no other meaning is given to it by the terms of such order, it should be construed as meaning a calendar month. "Such has been the practical construction of the word in this State in matters of practice." In both cases the old English rule was alluded to and disapproved. Indeed, that rule, which was apparently general, except as applied to bills of exchange and other commercial contracts, never seems to have obtained any substantial foothold in this country, though followed reluctantly in some of the older decisions, and has been practically abolished in all the States, either by express statute or by judicial interpretation. The word was held to import a calendar month as early as 1794, in the Circuit Court for the District of Pennsylvania, in construing an act of the legislature, (*Brudenell* v. *Vaux*, 2 Dall. 302,) and in 1808, in the Supreme Judicial Court of Massachusetts, it was said that "in this State, as well before as since the Revolution, a month mentioned generally in any act had immemorially been considered as a calendar

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month." *Avery* v. *Pixley*, 4 Mass. 460, 461. Indeed, the English rule was not adopted without a protest from Lord Kenyon, one of the most eminent of her common law judges, in *Lacon* v. *Hooper*, 6 T. R. 226, and was abolished by statute in 1850. 13 & 14 Vict. c. 21.

It is claimed, however, that as the proceeding to foreclose this deed was *in rem*, the seizure of the property proceeded against was the foundation of the jurisdiction of the court, and that a defective publication of notice, though it might reverse a judgment in such a case for error in departing from the directions of the statute, does not render such a judgment, or the subsequent proceedings, void; and the case of *Cooper* v. *Reynolds*, 10 Wall. 308, is relied upon in support of this position. While the ruling of this court in that case appears to have been that jurisdiction is acquired by an actual seizure of the property attached, and that defective or irregular affidavits and publications of notice do not render such a judgment void, the case really turned upon the fact that the suit was begun by a seizure of the property of the defendant under a writ of attachment, and in that respect it is distinguishable from this case; for although the court was in possession of the property proceeded against in the bill filed by Budington, Wilson & Co., to which the Trust and Safe Deposit Company was defendant, such receiver had been appointed upon the bill filed by Canova, to which the plaintiff was not made a party; and the order consolidating that cause with the suit by Budington, Wilson & Co., in which the plaintiff was named as party, and in which it was attempted to obtain service by publication, was not made until February 6, 1885, two months after the expiration of the time within which the notice of publication required the plaintiff to answer, and after a decree *pro confesso* had been taken against it. The receivership could not have the effect of subjecting the property to the control of the court in the particular bill filed by Budington, Wilson & Co. against the plaintiff, until the order of consolidation which, as before stated, was after the time limited for plaintiff's appearance, and after an order *pro confesso* had been entered against it. The case of *Cooper* v. *Reynolds* was one

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where property was seized by virtue of an attachment taken out at the commencement of the suit in which the proceedings to call in the non-resident defendant were had, and the record asserted that "publication had been made according to law." Indeed, Mr. Justice Miller said in that case, p. 319, "we do not deny that there are cases . . . in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction." It was said by Mr. Justice Wayne, in *Williamson* v. *Berry*, 8 How. 495, 540, in reply to an argument that a decree in chancery could not be looked into in a collateral way, that "it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law." The decisions of this court upon this subject, beginning in the year 1794 with the case of *The Betsey*, 3 Dall. 6, have been uniform and consistent. The following are a few of the leading cases upon this subject: *Rose* v. *Himely*, 4 Cranch, 241; *Elliott* v. *Peirsol*, 1 Pet. 328; *Wilcox* v. *Jackson*, 13 Pet. 498; *Shriver's Lessee* v. *Lynn*, 2 How. 43; *Lessee of Hickey* v. *Stewart*, 3 How. 750; *Webster* v. *Reid*, 11 How. 437. In the last case it was held that where jurisdiction had been sought to be obtained by publication, as in this case, it was necessary to show that notice had been given by publication as the act required. "If jurisdiction," says the court, "could be exercised under the act, it was essential to show that all its requisites had been substantially observed. It was necessary for the plaintiff to prove notice, and negative proof that the notice was not given, under such circumstances, could not be rejected." In *Hunt* v. *Wickliffe*, 2 Pet. 201, an order was made by a state court of chancery for a non-resident to appear, and that a copy be published "for eight weeks in succession agreeably to law," and it was

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held that, as the laws of Kentucky only authorized their courts of chancery to make decrees against absent defendants on the publication of an order for two months successively, the order of the court of chancery for a publication for eight weeks was not a compliance with the law, the Supreme Court of Kentucky having decided that the publication must be continued for two calendar months. Under this construction of the act, the decree was made against persons who were not parties to the suit, and it was held that it could not affect them. So in *Galpin* v. *Page*, 18 Wall. 350, it was held that when by legislation of a State constructive service of process by publication is substituted in place of personal service, the statutory provision must be strictly pursued in order to bind a citizen of another State not personally served. "Whenever," says Mr. Justice Field, "it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. . . . When, therefore, by legislation of a State, constructive service of process by publication is substituted in place of personal citation, . . . every principle of justice exacts a strict and literal compliance with the statutory provisions." pp. 368, 369. Later cases to the same effect are *Earle* v. *McVeigh*, 91 U. S. 503; *Settlemier* v. *Sullivan*, 97 U. S. 444; *Cheely* v. *Clayton*, 110 U. S. 701; *Applegate* v. *Lexington &c. Mining Co.*, 117 U. S. 255; and there is scarcely a State in the Union in which the same principle has not been announced and reaffirmed.

We think the publication of the notice in this case for the full period required by law was necessary to the validity of the decree pronounced upon the basis of such publication, *Early* v. *Doe*, 16 How. 610, and as such publication was not made for that period, the decree based upon such notice was no estoppel of the plaintiff in this case.

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3. It is claimed, however, that the decree dismissing the bill was proper, because there were no bonds of the railroad company, whose property defendant purchased at the sale by the state court, and which executed the mortgage to the plaintiffs, legally outstanding, and consequently plaintiff had not a sufficient interest or title to maintain this suit. On December 23, 1886, about a month after the bill, and a few days after the answer was filed, an order was entered referring the cause to a master, to notify all persons holding bonds or coupons of the railroad company to file the same with the master before the 1st day of February, 1887, with power to any party to the suit, or any person who should have filed any such bonds or coupons, to take testimony before the master, touching the holding and ownership of the same, with a reservation on the part of the court to pass upon all questions of law or fact connected therewith. In pursuance of this notice bonds to the amount of $23,000 were filed by Ambler & Taliaferro, the validity of which was made the subject of contention. These bonds were purchased by them in Jacksonville through John T. Walker, agent of the purchasers, Taliaferro giving his check for the money. The bonds belonged originally to Thomas S. Harris, of Philadelphia, who sent them to J. C. Marcy, an attorney residing at Jacksonville, with an affidavit that he was a *bona fide* holder and owner of the bonds; that he acquired the same for value, and without notice that the bonds were issued improperly and without consideration. Marcy swears in this connection that he sold $23,000 face value of the bonds to Walker, as agent of the purchasers, and was paid the sum of $3450 therefor. He had notified Harris of the order of the special master that the bonds were to be filed on or before a certain day, and that these bonds must be accompanied by an affidavit of *bona fide* ownership. The sale, which had been talked about some time before, took place at the National Bank of the State of Florida. He delivered the affidavit, with the bonds, to the purchasers. He also swears emphatically that he had not, at the time he sold the bonds, knowledge of any fact which led him to suspect or believe that Harris had no right to sell

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them, nor had Walker such knowledge, so far as he knew. He says: "I cannot by any probability imagine that he could have any suspicion of the invalidity of any of the bonds sold to him." Walker, who is also a lawyer at Jacksonville, swears that he was employed by Ambler & Taliaferro to look into the condition of the affairs of the company, with the expectation of their becoming the purchasers, if they could do so safely. "My investigation satisfied me that there was a number of bonds outstanding of this company which were of doubtful validity as liens. . . . With Mr. Marcy's assistance I ascertained all the facts touching the *bona fide* holding of the bonds in Philadelphia. The evidence satisfied us that all the bonds were purchased in good faith, and I authorized Mr. Marcy to represent my clients and complete the transactions with these parties, Dunn and Harris, carefully instructing him to avoid the purchase of any bonds of Mr. Shreve Ackley, as to the validity of whose holding I had come to entertain doubts." He further testified that he required an affidavit of *bona fide* holding to accompany the bonds, and that no fact came to his knowledge which would raise any suspicion in his mind that the holder had no right to sell them. Mr. Taliaferro also swears that he had not the slightest knowledge of any facts which would lead a man of prudence to suspect that the bonds were not valid, nor even a suspicion. He had gone through the country, over the road, and had made up his mind that it would be a desirable purchase in connection with his timber interests. Acting under the advice of Mr. Walker, he authorized him to go to Philadelphia to endeavor to purchase the bonds. The only fact relied upon to show want of good faith appears to be that these bonds were sold upon the day of the sale of the railroad property, under the decree of the state court, and after the parties attending the sale, including Walker, the agent of the purchasers, had returned from Green Cove Springs, where the sale was made, to Jacksonville. Without going further into the evidence we think there is sufficient to show that there are bonds outstanding secured by this mortgage upon which plaintiff is entitled to maintain this bill, and that it is not necessary at this stage

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of the case to determine as a finality the amount, validity or ownership of such bonds, or the number which were held *bona fide* by the present holders; but that the case should be reversed and remanded for further proceedings in conformity with this opinion. Should the court proceed to a decree for foreclosure and sale, the holders of the bonds can be notified to appear and file them with the master, and all questions connected with their amount and ownership can be settled upon a final hearing.

The decree of the court below will, therefore, be

Reversed.

STOUT v. MASTIN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 1072. Submitted January 12, 1891. — Decided March 2, 1891.

In Kansas, if the description in a deed of land sold for non-payment of taxes departs from the description contained in the assessment roll and the prior tax proceedings, such prior description, if imperfect and insufficient, avoids the deed, although the description in the latter may be sufficient and complete.

THE case is stated in the opinion.

Mr. John Hutchings for plaintiff in error.

Mr. T. A. Frank Jones for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

This is an action of ejectment to recover the possession of seven lots in Kansas City, Kansas. Defendant rested his defence on tax deeds for the several lots, and the single question is as to the validity of those tax deeds. A jury being waived, the case was tried by the court; and findings of fact were made, from which the court, as a conclusion of law, held

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that the tax deeds were invalid by reason of a misdescription of the lots in the tax proceedings. Our inquiry is limited to the question whether, upon the findings, the conclusion was correct.

From these findings it appears that the present value of the lots is in excess of five thousand dollars. This suit was commenced prior to February 12, 1884. It further appears that in 1878 sale was made for the taxes of 1877; that thereafter the purchaser paid the taxes of 1878, 1879 and 1880; and that his total investment for these taxes was $104.80. The statutes of Kansas in force at the time of these proceedings gave to an investor in taxes twenty-four per cent interest. It certainly is a large demand on an investment of $104.80 to insist upon title to property worth more than five thousand dollars; and when by the laws of the State there is given a fixed and prior lien for the investment, and interest thereon at twenty-four per cent, it is impossible not to observe that the large interest ought to satisfy any reasonable person. But the purchaser rests on the letter of his bond, and he has a legal right so to do; but under such circumstances he must rest alone on its letter. He has no overpowering equity to justify a large and liberal interpretation of statutory proceedings. Surrounding circumstances may sometimes sustain an imperfect description in a voluntary deed by a grantor, but seldom one made in hostile tax proceedings. In *Tallman* v. *White*, 2 Comstock (2 N. Y.) 66, it was said that "an assessment for taxes of non-resident land is fatally defective if it contains such a falsity in the description of the parcel assessed as might probably mislead the owner, and prevent him from ascertaining by the published notices that his land was to be sold or redeemed. Such a mistake or falsity defeats one of the obvious and just purposes of the statute — that of giving to the owner an opportunity of preventing the sale by paying the tax." In *Hill* v. *Mowry*, 6 Gray, 551, the rule is laid down that a tax deed, "taking effect only as the execution of a statute power, should be construed with some strictness, so as to enable the grantee to identify the land, and to enable the owner to redeem it;" and it was held that a deed which

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bounded the land correctly on two sides, on the third by land on which it was in fact bounded only in part, and on the fourth by land from which it was separated by the land of another person, was void for uncertainty. Now the description in one of these tax deeds, and so far as the question here is concerned they are all alike, is "lot 246 Armstrong Street, Kansas City, Kansas, situated in the county of Wyandotte and State of Kansas." There was a lot in that city answering to this description; but such description does not conform to that found in the assessment roll and prior tax proceedings; and it was adjudged by the Supreme Court of Kansas, in the case of *Hewitt* v. *Storch*, 31 Kansas, 488, that in making a tax deed the county clerk has no power to go beyond the description in the prior tax proceeding; and if he adds anything thereto, such addition does not aid or materially benefit the deed. In other words, the description in a tax deed does not end the question. If it is a departure from that contained in the assessment roll and prior tax proceedings, such prior description, if imperfect and insufficient, avoids the deed, although the description in the latter may be sufficient and complete.

In that case the description in the assessment roll and prior tax proceedings was of a lot in Challiss's addition; that in the deed was of a lot of the same number in L. C. Challiss's addition. Plats of two additions to the city of Atchison had been filed — one named "Challiss's addition" and the other "L. C. Challiss's addition." There was an error in recording the first plat, which was attempted to be corrected by the second, which also included territory other than that described in the first; and the latter plat, with its description, became the recognized plat of the entire addition. So, to perfect the description, which in the assessment roll was Challiss's addition, in the tax deed the clerk described the lot as in L. C. Challiss's addition. In respect to this departure, that court observed in an opinion by Chief Justice Horton: "It is unnecessary for the purpose of this case to decide whether the tax-toll of 1872, or the tax certificate of May 15, 1873, sufficiently described lot 19, in block 16, in L. C. Challiss's addition to the city of Atchison. A tax

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deed to be valid must not only substantially conform to the requirements of the statute, but must correspond with the proceedings upon which it is based in all essential particulars. The county treasurer must give to the purchaser, on the payment of his bid, a certificate describing the lands purchased in accordance with the records of the tax proceedings in his office. If the land be not redeemed within the time prescribed by the statute, the county clerk of the county where the land is sold, on presentation to him of the certificate of sale, must execute in the name of the county, as county clerk, to the purchaser, his heirs or assigns, a deed to the land remaining unredeemed; but he has no power to insert in the deed executed by him another and different description from that contained in the tax proceedings. While it is sufficient to describe lands in all proceedings relative to assessing, advertising or selling the same for taxes, by initial letters, abbreviations and figures to designate the township, range, section or parts of section, and also the number of lots and blocks, and while it is competent for the county clerk, instead of using such initial letters, abbreviations and figures in tax deeds executed by him, to write out in full the words which such initial letters, abbreviations, etc., represent, yet he is not to make any material or substantial variance in the description of the property inserted in the deed from that set forth in the prior tax proceedings upon which it is based. Each act of the tax proceedings must substantially correspond with its immediate antecedent. Blackwell on Tax Titles, 434."

That case is decisive of this. For while the tax deed describes lot 246, Armstrong Street, the assessment roll describes the property as lot 246, Armstrong block. It is true the ninth finding of fact shows that "upon the plat of Kansas City, Kansas, and in conveyances of land and in tax-sale proceedings in the old city of Kansas City, Kansas, the lots are numbered by streets and not by the block, and 'Ewing,' 'Joy,' 'James,' 'Wood' and 'Armstrong' are names of streets in said city;" and the eighth finding also shows that "on the first page of the tax roll, and in respect to other lots, underneath the printed heading 'block' appeared the written words 'Ewing Street;'"

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and the contention is, that where thereafter, on subsequent pages, adjoining the printed word "block," appeared the written word "Armstrong," or "James," "Wood," or "Joy," it was to be understood as describing not block but street; and that the peculiarity of description obtaining in Kansas City, Kansas, by lot and street rather than by lot and block, as obtains elsewhere in the State, was fully indicated by the entry on the first page of the tax roll in respect to "Ewing Street." While it appears affirmatively from this ninth finding that the custom was to describe lots by number and street, and not by number and block, yet, it does not appear that there were no blocks known by these descriptive names, "Armstrong," "Wood," "James," etc. It is common knowledge that in many cities lots which are on streets, and are entitled to the appropriate number of lots on such streets, have, in general understanding, a peculiar and separate description by virtue of being in certain blocks, or facing on certain open squares; and it is not found that such peculiarity of description, generally known and accepted, did not obtain in the city of Kansas City, Kansas. If the description in the tax roll was inaccurate, and it was sought to perfect that description by evidence aliunde, it should have appeared affirmatively, not merely that the description by reasonable correction might apply to the lots in controversy, but also that it was not applicable to any other lots. Such fact does not appear in these findings; and as a party claiming under a tax deed necessarily relies on the letter of his bond, he cannot, where the description in the proceedings upon which his deed is based is inaccurate, content himself with the act of the county clerk in making in the tax deed a sufficient correction, but must also show that the description in the tax proceedings, though inaccurate, could not be mistaken.

From the findings of fact the conclusion of the Circuit Court cannot be adjudged erroneous, and, therefore, its judgment for the plaintiff must be *Affirmed.*

Mr. Justice Brown dissenting.

I think that under the General Statutes of Kansas, secs.

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6993 and 7008, the description in these deeds was sufficient. These sections are printed in the margin.[1]

JOHNSON *v.* POWERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 147. Argued January 12, 13, 1891. — Decided March 9, 1891.

An administrator appointed in one State cannot as such maintain any suit in another State.

A judgment recovered against an administrator in one State is no evidence of debt in a suit by the same plaintiff in another State against third persons having assets of the deceased.

The allowance, by commissioners appointed by a probate court in the State of Michigan, pursuant to statute, of a claim against the estate of a deceased person, upon a hearing to which the only party is the administrator in his personal capacity as claimant, and in his representative capacity as defendant, is no evidence of debt in a suit in equity by him in the Circuit Court of the United States in New York to recover from other persons assets of the deceased.

APPEAL from a decree dismissing a bill in equity. The case is stated in the opinion.

Mr. A. H. Garland (with whom was *Mr. H. J. May* on his brief) for appellant. *Mr. Joseph P. Whittemore* filed a brief for same.

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[1] "SEC. 6993. No irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceeding or the title conveyed by the tax deed; nor shall any failure of any officer or officers to perform the duties assigned him or them, upon the day specified, work an invalidation of any such proceedings or of said deed."

"SEC. 7008. In all advertisements, certificates, papers or proceedings relating to the assessment and collection of taxes and proceedings founded thereon, any description of lands which shall indicate the land intended with ordinary and reasonable certainty, and which would be sufficient between grantor and grantee in an ordinary conveyance, shall be sufficient."

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Mr. William F. Cogswell for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, filed in the Circuit Court of the United States for the Northern District of New York, by George K. Johnson, a citizen of Michigan, in behalf of himself and of all other persons interested in the administration of the assets of Nelson P. Stewart, late of Detroit in the county of Wayne and State of Michigan, against several persons, citizens of New York, alleged to hold real estate in New York under conveyances made by Stewart in fraud of his creditors.

The bill is founded upon the jurisdiction in equity of the Circuit Court of the United States, independent of statutes or practice in any State, to administer, as between citizens of different States, any deceased person's assets within its jurisdiction. *Payne* v. *Hook*, 7 Wall. 425; *Kennedy* v. *Creswell*, 101 U. S. 641.

At the threshold of the case, we are met by the question whether the plaintiff shows such an interest in Stewart's estate as to be entitled to invoke the exercise of this jurisdiction.

He seeks to maintain his bill, both as administrator, and as a creditor, in behalf of himself and all other creditors of Stewart.

The only evidence that he was either administrator or creditor is a duly certified copy of a record of the probate court of the county of Wayne and State of Michigan, showing his appointment by that court as administrator of Stewart's estate; the subsequent appointment by that court, pursuant to the statutes of Michigan, of commissioners to receive, examine and adjust all claims of creditors against the estate; and the report of those commissioners, allowing several claims, including one to this plaintiff, "George K. Johnson, for judgments against claimant in Wayne Circuit Court as endorser," and naming him as administrator as the party objecting to the allowance of all the claims.

The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in

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that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either State or national, held in any other State. *Stacy* v. *Thrasher*, 6 How. 44, 58; *Noonan* v. *Bradley*, 9 Wall. 394.

The question remains whether, as against these defendants, the plaintiff has proved himself to be a creditor of Stewart. The only evidence on this point, as already observed, is the record of the proceedings before commissioners appointed by the probate court in Michigan. It becomes necessary therefore to consider the nature and the effect of those proceedings.

They were had under the provisions of the General Statutes of Michigan, (2 Howell's Statutes, §§ 5888–5906,) "the general idea" of which, as stated by Judge Cooley, "is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the probate court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode." *Clark* v. *Davis*, 32 Michigan, 154, 157. The commissioners, when once appointed, become a special tribunal, which, for most purposes, is independent of the probate court, and from which either party may appeal to the circuit court of the county; and, as against an adverse claimant, the administrator, general or special, represents the estate, both before the commissioners and upon the appeal. 2 Howell's Statutes, §§ 5907–5917; *Lothrop* v. *Conely*, 39 Michigan, 757. The decision of the commissioners, or of the circuit court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *La Roe* v. *Freeland*, 8 Michigan, 530. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in the control of the probate court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. *Shurbun* v. *Hooper*, 40 Michigan, 503.

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Those statutes provide that, when the administrator declines to appeal from a decision of the commissioners, any person interested in the estate may appeal from that decision to the circuit court; and that, when a claim of the administrator against the estate is disallowed by the commissioners and he appeals, he shall give notice of his appeal to all concerned by personal service or by publication. 2 Howell's Statutes, §§ 5916, 5917. It may well be doubted whether, within the spirit and intent of these provisions, the administrator, when he is also the claimant, is not bound to give notice to other persons interested in the estate, in order that they may have an opportunity to contest his claim before the commissioners; and whether an allowance of his claim, as in this case, in the absence of any impartial representative of the estate, and of other persons interested therein, can be of any binding effect, even in Michigan. See *Lothrop* v. *Conely*, above cited.

But we need not decide that point, because upon broader grounds it is quite clear that those proceedings are incompetent evidence, in this suit and against these defendants, that the plaintiff is a creditor of Stewart or of his estate.

A judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them.

A judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Aspden* v. *Nixon*, 4 How. 467; *Stacy* v. *Thrasher*, 6 How. 44; *McLean* v. *Meek*, 18 How. 16; *Low* v. *Bartlett*, 8 Allen, 259.

In *Stacy* v. *Thrasher*, in which a judgment, recovered in one State against an administrator appointed in that State, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held within another State against an administrator there appointed of the same

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intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from:

"The administrator receives his authority from the ordinary, or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction." 6 How. 58.

In answering the objection that to apply these principles to a judgment obtained in another State of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject matter when the proceeding was *in rem;* and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law or by estate; and proceeded as follows:

"An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts." 6 How. 59, 60.

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established

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his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." "The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61.

In *Low* v. *Bartlett*, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similiar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: "The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor." 8 Allen, 266.

In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the probate court in Michigan, giving it the utmost possible effect, faith and credit, yet, if considered as a judgment *in rem*, bound only the assets within the jurisdiction of that court, and, considered as a judgment *inter partes*, bound only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate wherever it might be; but only against his assets and his administrator in Michigan. The only parties to the decision of the commissioners were Johnson, in his personal

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capacity, as claimant, and Johnson, in his representative capacity, as administrator of those assets, as defendant. The present defendants were not parties to that judgment, nor in privity with Johnson in either capacity. If any other claimant in those proceedings had been the plaintiff here, the allowance of his claim in Michigan would have been no evidence of any debt due to him from the deceased, in this suit brought in New York to recover alleged property of the deceased in New York from third persons, none of whom were parties to those proceedings, or in privity with either party to them. The fact that this plaintiff was himself the only party on both sides of those proceedings cannot, to say the least, give the decision therein any greater effect against these defendants.

The objection is not that the plaintiff cannot maintain this bill without first recovering judgment on his debt in New York, but that there is no evidence whatever of his debt except the judgment in Michigan, and that that judgment, being *res inter alios acta*, is not competent evidence against these defendants.

This objection being fatal to the maintenance of this bill, there is no occasion to consider the other questions, of law or of fact, mentioned in the opinion of the Circuit Court and discussed at the bar.

Decree affirmed.

MR. JUSTICE BROWN dissenting.

I am constrained to dissent from the opinion of the court in this case. This is a bill by a creditor to reach the assets of his insolvent and deceased debtor, alleged to have been fraudulently conveyed by him before his death. Did the plaintiff sue in his capacity as administrator, it is freely conceded that under the case of *Noonan* v. *Bradley*, 9 Wall. 394, his bill could not be maintained. But, while the bill recites his appointment as administrator, it is rather by way of introduction to the proceedings which were subsequently had in the probate court than as an independent title to relief. After the recital of such proceedings, the bill proceeds to state in substance that during the year 1874 commissioners were duly

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appointed by the probate court having jurisdiction of the estate of the decedent, to hear, determine and adjudicate upon claims of creditors against said estate, before whom plaintiff appeared and presented his claim as creditor of said Stewart, which said claim was proved before said commission, and judgment rendered in favor of plaintiff for $84,975.04. And the report of said proceedings and judgment was duly filed in said probate court on February 3, 1875.

It is further averred that said Stewart at his decease left no property, real or personal, in the State of Michigan, except certain real estate alleged to have been fraudulently conveyed, and that his estate was utterly and hopelessly insolvent; but that upon suit by plaintiff as administrator against the fraudulent transferees of such real estate, about 7 per cent of the aggregate indebtedness proved in the probate court was recovered.

The bill further states that no administration has ever been applied for or had in the State of New York, and that decedent left no personal or other assets in that State, except the real estate sought to be reached by this bill.

By Howell's Statutes of Michigan, section 5888, when "letters testamentary or of administration shall be granted by the judge of any court of probate, such judge may, in his discretion, . . . appoint two or more suitable persons to be commissioners to receive, examine and adjust all claims and demands of all persons against the deceased," etc. These commissioners give public notice of their meeting, proceed to hear testimony, and adjudge as to the validity of each claim presented. By section 5898 they are required to make report of claims allowed, and by section 5902, "when commissioners shall be appointed . . . no action shall be commenced against the executor or administrator . . . until the expiration of the time limited by the court for the payment of the debts." By the construction given to these sections by the Supreme Court of Michigan, the commissioners are an independent special tribunal, (*Lothrop* v. *Conely*, 39 Michigan, 757,) and while not a court, in the constitutional sense, they act judicially in the allowance of claims. *Fish* v. *Morse*, 8 Michi-

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gan, 34; *Clark* v. *Davis*, 32 Michigan, 154, 157; *Shurbun* v. *Hooper*, 40 Michigan, 503. Their decisions, unless appealed from, are final, and are to all intents and purposes judgments, except that no execution can issue upon them. But the amount allowed in each case becomes a debt which the administrator is bound to pay from the assets of the estate. Indeed, it is not perceived why these are not "judicial proceedings" within the meaning of Article 4 of the Constitution, to which "full faith and credit" must be given by the courts of other States.

It is true that these proceedings are not binding upon others than parties and privies, and if this were an action against the administrator of the same estate in the State of New York it is conceded at once that under the case of *Stacy* v. *Thrasher*, 6 How. 44, the action would not lie. But it is difficult to see how the defendants in this case could be made parties to a suit at law to recover this debt, for which they are certainly not primarily liable, nor is there any one against whom an action could be brought in the State of New York, since there is no administrator or other representative of Stewart's estate there who could be made defendant in such suit. I had supposed that the only objects of obtaining a judgment as the foundation for a bill of this description were, either to fix the status of the plaintiff as a creditor, or to show, by an execution returned unsatisfied, that he had exhausted his remedy at law. In this case, as before stated, no execution could issue under the practice in Michigan, and the averments of the bill show that even if it could have issued, it would have been unavailing, since the estate was hopelessly insolvent, and there was no property subject to execution. Of course no execution could issue in New York, and there was no person there against whom an action could be brought or a judgment obtained. I see no reason why this case is not controlled in this particular by that of *Case* v. *Beauregard*, 101 U. S. 688, in which it was held that, while it was true that a creditor's bill to subject a debtor's interest in property to the payment of the debt must show that all remedy at law had been exhausted, and generally it must be averred that judgment

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had been recovered for the debt, and execution issued and returned unsatisfied, after all, these were only evidences that the legal remedies had been exhausted, and not the only possible means of proof; and that, where it appeared by the bill that the debtor was insolvent, and the issuing of an execution would be of no practical utility, the issue of such execution is not a necessary prerequisite to equitable interference. Such was also the ruling of this court in *Sage* v. *Memphis & Little Rock Railroad*, 125 U. S. 361, 376. Indeed, it appears from the case of *Kennedy* v. *Creswell*, 101 U. S. 641, that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debts, though he may never have obtained judgment at all. "When there," says Mr. Justice Bradley, "he will not be turned back to a court of law to establish the validity of his claim. The court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits." In that case, the plaintiffs appeared only as the holders of a note against the deceased. In the case under consideration, the debt is evidenced by the allowance of plaintiff's claim by the probate court in Michigan. I fail to understand how the defendants in this case could have been made parties to such proceedings, or to appreciate the necessity of such action, although they would be at liberty to insist that the probate court had no jurisdiction to allow the claim, and perhaps also that the claim itself was not valid against the estate.

As the other questions are not discussed by the court, I do not deem it necessary to express an opinion upon them.

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Counsel for Plaintiff in Error.

KING *v.* DOANE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 77. Argued November 14, 1890. — Decided March 2, 1891.

The mere renewal of a negotiable promissory note does not, as between the original parties, affect the essential nature of the transaction represented by it.

If, in an action by an endorsee against the maker of a negotiable promissory note, the note is shown to have been obtained by fraud, the presumption, arising merely from the possession of the instrument, that the holder in good faith paid value, is so far overcome that he cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he in fact purchased for value.

The rule which protects a *bona fide* holder for value of commercial paper against defences or equities, that might be good, as between the original parties, does not require that the holder shall have paid full value: but if the amount paid is greatly disproportioned to the real value, the security may be regarded as having been obtained without paying anything for it.

King agreed to take $10,000, par value, of the capital stock of a corporation being organized, and to pay $6666.66 for it. He executed his promissory note for the latter amount that it might be discounted and the proceeds applied on his subscription, his stock to be held as security until the note should be paid. Doane, who had already subscribed and paid his subscription, surrendered 100 shares to the company, which were allotted to King, and a certificate issued to him therefor, which certificate, being endorsed by him in blank, was given, with the note, to Doane as security for the payment of it, in consideration of his surrender of the 100 shares. At maturity the note not being paid, a note of $7118.50 was given in renewal. King being sued on the renewal note, set up that he had been induced to make the subscription by false and fraudulent representation on the part of an agent of the company, and that Doane had not paid full value for the note. *Held*, that Doane had purchased the original note for value, and without knowledge or notice of any fraud or bad faith in the transaction, and could recover.

THE case is stated in the opinion.

Mr. M. P. Brewer for plaintiff in error. *Mr. F. B. Hart* was with him on the brief.

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Mr. W. E. Hale for defendant in error. *Mr. John M. Miller* was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought to recover the amount due on a promissory note executed November 10, 1884, by King for the sum of $7118.50, and made payable to the plaintiff Doane or his order one year after date, with interest at the rate of seven per cent per annum from date until paid. By direction of the court the jury returned a verdict in favor of the plaintiff for the full amount of the note, with interest. A new trial having been refused, judgment was entered in conformity with the verdict. 30 Fed. Rep. 106.

The defence is, that the note sued on had no other consideration than the surrender and cancellation of a previous note alleged to have been obtained, with the knowledge and aid of Doane, by fraud and false representations; that the endorsement and transfer of the original note to him was wholly without consideration; and that the renewal note was executed by King in ignorance of the fraud perpetrated on him, and because of the false statement by Doane, through his agent, that he was the *bona fide* holder of the first note.

The principal facts out of which this litigation has arisen are as follows: During the fall of 1883, King, the plaintiff in error, had frequent interviews with one Frank B. Felt in reference to the purchase, by the former, at the price of $6666.66, of ten thousand dollars, par value, of the capital stock of the Pullman Iron and Steel Company, a corporation then recently organized under the general laws of Illinois with a capital stock of $500,000 divided into 5000 shares of $100 each, for the purpose of manufacturing iron and steel in different forms, principally the bayonet railway spike for which a patent had been issued to J. P. Perkins. This patent, at the time of the organization of the company, belonged to Felt, Perkins, J. W. Doane and James N. Smith, the latter representing, it is alleged, George M. Pullman. Felt, Doane, Perkins and Smith constituted a majority of the directors, and Felt was the secre-

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tary and treasurer of the corporation. It does not appear that King made a formal written subscription of stock. But, under date of November 7, 1883, Felt wrote to him: "If convenient, please remit one-half amount of subscription to stock, amounting to $3333.33. Any time before the 15th will answer. We are progressing finely and everything looks very flattering, having had applications from three companies to start other works at different places. I am confident we have the best thing in the country, and the outcome will make us happy; will see you about the 25th, and advise you of progress and the decision of directors as to starting other companies, either in stock or royalty." King replied under date of the 10th: "Yours of the 7th at hand. I have a deal on hand which ought and, I believe, will pan out before the 15th, and I will respond as soon as it does. I expect to be in Chicago very soon; next week possibly, and certainly not later than the week following. Will it answer if I make the payment then? You have no idea how d—d tight money is up here, and I sometimes feel like getting tight myself, but I think I am sure of being easy in a few days; glad to know of the promising outlook. Let me hear from you." This was followed by further correspondence, in which Felt urged King to pay the assessment made upon him, while King promised payment as soon as he could make arrangements for the money. In those letters Felt expressed high hopes for the future of the company. Under date of February 18, 1884, King wrote to him: "I appreciate the situation as you describe it, and have delayed writing until this time, hoping to bring a settlement of the matter in which I have the funds you need and considerably more locked up, but can't do it, and must therefore come back to first principles and do the best I can, viz.: I will send you my note for the amount, $6666.66 due October 1, 1884, at 8 per cent, and until it is paid you may hold the $10,000 of stock as security, giving me a receipt showing what the transaction is. Your security will thus be ample and you can discount the note to meet present needs. If I can get funds in, as I hope and expect to do, at an earlier date than above named, would be glad to take the note up before maturity, of

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course, but must fix a time which will render it certain that I shall not disappoint you or be disappointed myself. I trust that you can arrange matters on this basis, and, if so, will close it up at once." In a letter of February 22, 1884, Felt inclosed a note to be signed by King, dated January 5, 1884, for $6666.66, payable on the 1st of October thereafter to the order of the Pullman Iron and Steel Company at the First National Bank, Minneapolis, with interest at the rate of 8 per cent per annum until paid. This note was signed by King and returned to Felt in a letter of February 25, 1884, in which King said: "Yours of the 22d at hand, and I herewith return the note, duly signed. Please return a receipt, which will cover the transaction and show that you hold my $10,000 of full-paid stock as security for the payment of said note, so that in case either of us should be snuffed out meanwhile our administrators might have an easy job. Am delighted to know of the brilliant prospects of the company, and trust it will pan even larger than you anticipate. Our electric light business is climbing." Felt, as treasurer, delivered to King a receipt, dated March 1, 1884, showing that, when the above note was paid, "full-paid stock is to be issued" to him "for $10,000 in the Pullman Iron and Steel Company."

On the 19th of April, 1884, the company issued to King a certificate of 100 shares of stock, and it was inclosed the same day to King, in a letter from Felt, in which the latter said: "Please endorse in blank on back of the same. Mr. Doane advanced the money on it, and this is to be held by him until note is paid, when stock will be returned to you. This should have been done when note was made, but just made our issue of stock and now do this to close up the books. We are running in good shape. The leading iron man of the country, after looking over our works last night, said he thought the stock would double in a year and double again, and pay good interest on the same. We are having large demand. Please sign and return at once." King, as requested, executed an assignment, in blank, of the certificate, and returned it to Felt in a letter of April 24, in which he said: "Your favor of 19th, enclosing certificate No. 31 for 100 shares of the capital stock

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of the Pullman Iron and Steel Company in my name, is just received, and, as requested by you, I herewith return it, endorsed in blank, to be held by Mr. Doane until my note of January 5, 1884, for $6666.66, due October 1, 1884, is paid, when said certificate is to be returned to me. Am delighted to hear of the flattering prospects of the company. The value of the stock can't double too often to suit."

The explanation given by Felt of the transaction by which Doane got King's note as collateral was, that while, in consideration of the transfer by Doane, Perkins, Smith and himself to the company of the patent for the bayonet spike, the original stock was divided equally between them on the basis of 1250 shares to each, one-half of the stock was donated to the treasury of the company to be sold, the proceeds to be used in building a plant and as a working capital for the company. Felt testified: "I, as an officer of the company, received it [the note] from Mr. King. Soon after the receipt of this note it became necessary for the company to have funds, and it was assumed that I, as one of the interested parties to [in] this company, should provide a certain amount of money by the sale of stock, and Mr. Doane, claiming that I had not provided the full amount, offered to discount my own note and take this note of Thomas S. King as a collateral against the same. Soon after the execution of my note to J. W. Doane he asked me if I wished to hold this note of King's and dispose of my own stock, I having raised the money necessary to cover the amount of this subscription; if not, he would take the note and assign to Thomas S. King one hundred shares of his stock. This was before the company had commenced operations, and it looked as if it would be a very profitable institution, and I told him that I did not care to dispose of any of my stock. So, on April 19, 1884, J. W. Doane transferred 100 shares of his stock. The same was assigned to T. S. King and held as collateral by J. W. Doane against the note given by King. The note that I gave to J. W. Doane, upon which the money was advanced, has been paid by me."

In explanation of the statement that he was to provide a certain amount of money by the sale of stock, Felt said: "It

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was agreed that fifteen hundred shares of the stock should be sold at a certain price, one-half of said stock being taken by the two subscribers. Upon my coming to Chicago I found that it was understood that Mr. Perkins and myself were to place the other one-half of the stock."

The note discounted by Doane, with the King stock as collateral, was executed by Felt, individually, March 8, 1884, and was paid about September 1, 1884. Being asked to explain the transfer by Doane of one hundred shares of stock, Felt said: "That was done by a certificate of transfer, under date of April 19, 1884, to Thomas S. King by J. W. Doane, Mr. Doane surrendered his certificate of 625 shares, dated April 12, 1884, and a new certificate was issued to him for five hundred and twenty-five shares, under date of April 19, 1884, being the amount of his original certificate of shares, less the amount transferred to Thomas S. King, and a certificate of one hundred shares was issued to King. The certificate of stock was signed by W. E. Barrows, vice-president, and Frank B. Felt, secretary." Of the 2500 shares transferred to Felt, as trustee, fifteen hundred shares were sold at sixty-six and two-thirds cents on the dollar, the proceeds of the same being used to erect a manufacturing plant. The remaining one thousand shares were intended to be held and sold at par for an operating capital. Doane took 375 shares, paying in cash therefor the sum of $25,000. A like amount, at the same price, was taken by Pullman, and paid for by him or through the Pullman Palace Car Company.

When the note of January 5, 1884, became due, King received notice of its being in bank for collection. He says: "I had reason to believe it was in Chicago, and the fact that there was no sale for the stock was a disappointment to me, but I presumed that Mr. Doane was the innocent holder of the note for value. I knew none of the facts upon which I now base my defence. The note was claimed and represented to be the property of Mr. Doane at that time. I was unable to pay it, and renewed it for the one sued upon in this case, [for $7118.50, dated November 10, 1884,] payable to J. W. Doane. The difference in the amounts of the two notes is.

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accounted for by the interest being added. Additional security was demanded of me, and I gave, in addition to the Pullman Iron and Steel Company stock held by Doane, $8500 of stock in the Brush Electric Company. There was no new consideration for the last note. It was simply a renewal and extension of time."

Giving the defendant the benefit of every reasonable inference from the evidence, did the court below err in directing a verdict for the plaintiff? It was proven beyond question that the defendant agreed to take $10,000, par value, of the capital stock of the Pullman Steel and Iron Company, and pay for it the sum of $6666.66; that he executed the note of January 5, 1884, for the latter amount that it might be discounted, and the proceeds applied on his subscription, the stock subscribed to be held as security until the note was paid and a certificate of stock, full paid, to be issued to King upon such payment being made; that a certificate for 100 shares, surrendered by Doane, was issued to King, by whom it was assigned, in blank, to Doane, to be held by the latter as collateral security for the note of January 5, 1884; that the note was endorsed and delivered to Doane, in consideration of his having surrendered to the company the above 100 shares of his full-paid stock; and that, subsequently, the note sued on for $7118.50 was given in renewal of the note for $6666.66.

If King was induced by false or fraudulent statements of Felt, representing the company, to subscribe for stock and to make the note for $6666.66, he would not have been liable as between himself and the company either on the subscription or on the note. Nor would he have been liable to the company upon any note taken by it simply in renewal. The principle is well established that, as between the maker and payee, any defence that would be good against the original note will be equally good against a note taken in renewal without additional consideration, or under circumstances not showing a valid waiver of such defence. The mere renewal of a note does not, as between the original parties, affect the essential nature of the transaction represented by it. *McLaughlin* v. *Bank of Potomac*, 7 How. 220, 228; *Jones* v. *Guaranty and Indemnity*

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Co., 101 U. S. 622, 630; *Sawyer* v. *Wiswell*, 9 Allen, 39, 42; *Holden* v. *Cosgrove*, 12 Gray, 216, 217. If the subscription and original note were obtained by fraud, these principles would determine this case adversely to Doane unless he gave value for the original note without notice of the alleged fraud. Whether he did or did not give value, without such notice, is the vital question in the case. And that question must be considered with reference to the established rule, that if in an action by an indorsee against the maker a negotiable note is shown to have been obtained by fraud, the presumption, arising merely from the possession of the instrument, that the holder in good faith paid value is so far overcome that he cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he, in fact, purchased for value. *Smith* v. *Sac County*, 11 Wall. 139, 148; *Commissioners* v. *Clark*, 94 U. S. 278, 285; *Stewart* v. *Lansing*, 104 U. S. 505, 509; *Pana* v. *Bowler*, 107 U. S. 529, 542. In the case supposed he must show that he paid value. That fact being established, he will be entitled to recover, unless it is proved that he purchased with actual notice of defect in the title, or in bad faith, implying guilty knowledge or wilful ignorance. *Goodman* v. *Simonds*, 20 How. 343, 367; *Murray* v. *Lardner*, 2 Wall. 110, 121; *Hotchkiss* v. *National Bank*, 21 Wall. 354, 359; *New Orleans* v. *Montgomery*, 95 U. S. 18; *Swift* v. *Smith*, 102 U. S. 442, 444.

It is argued that the evidence does not show the payment of value by Doane. We lay out of view altogether the fact that the original note may have first come to his hands as collateral security for Felt's individual note of March 5, 1884; for it does not distinctly appear that the delivery to Doane, for that purpose, of King's note was with the assent of the company; and without such assent, Doane could not rightfully have taken it as security for Felt's debt to him. The money advanced by Doane upon Felt's individual note was advanced to the latter in order that he might perform his promise to "place" a part of the stock donated to the company, and put in his hands, as trustee, for sale. But did not Doane pay value when he surrendered one hundred shares of

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the original stock issued to him on account of his part ownership of the patent right transferred to the company? That stock was deemed of value by him; for, as we have seen, of the shares donated by the original stockholders to the company's treasury, he took 375 shares, paying therefor in cash twenty-five thousand dollars. When the transaction took place he had substantial reasons for believing, and so far as the evidence shows, in good faith believed, that the patent right in question was of value. And his confidence in the enterprise was manifested by the large sum invested by him. The question as to his having paid value does not depend upon the inquiry whether the result of the company's operations justified the high expectations for its success that were indulged at the outset. And the rule that protects a *bona fide* holder for value of commercial paper against defences or equities that might be good, as between the original parties, does not require that the holder shall have paid full value. As said in *Gould* v. *Segee*, 5 Duer, 260, 270, "when a parting with value is proved, the amount of the consideration is not otherwise important than as bearing on the question of actual or constructive notice." So, in *Baily* v. *Smith*, 14 Ohio St. 396, 402, the Supreme court of Ohio held that the rule does not require the full face of the paper to be paid, and that a contrary principle would not only deprive commercial paper of one of the most essential and valuable incidents of negotiability, but would disastrously affect the business and commerce of the country. We do not mean to say that the real amount of the consideration paid by the holder may not, under some circumstances, be important in determining whether, within the rule adverted to, he paid value. The amount paid may have been so disproportioned to the real value of the security purchased that the claim to have paid value will be treated as a mere pretence, and the security as having been obtained without paying anything for it. But no such case is here presented. It is idle to say that what Doane paid for the note was, at the time, so insignificant as compared with the face or real value of King's note that a presumption arises that he had notice of some defence upon the part of King. The stock

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surrendered by him to be issued to King was his individual property, and was deemed by him of equal value with the note; for he had taken and paid for 375 shares at the same rate, per share, that King was to pay for the stock subscribed by him. The question of value is to be determined by the situation as it was, and as it was reasonably regarded, at the time Doane purchased the note. King had subscribed for $10,000 par value of the stock, and had given his note that it might be discounted and the proceeds applied on his subscription; and he expected that it would be discounted by Doane. Of these facts Doane was informed when he surrendered one hundred shares of his full-paid stock that it might be issued to King; for these matters appeared on the face of the transaction. And the evidence entirely fails to show that Doane had knowledge of any fraudulent representations by Felt or of any fact that would relieve King from obligation to meet his subscription or to pay the note executed by him to the company, or that Felt made any representations to King at the instance of Doane. King, so far as was known to Doane, had assumed to pay the whole amount of the original note, whatever may have been, at the time, the intrinsic value of the stock. The note was endorsed to Doane in consideration of his surrendering one hundred shares of his stock to be issued to King. It was precisely as if Doane had exchanged with the company (and it was competent for the parties to make such an exchange) one hundred shares of his full paid stock for King's note; in which case, King could not have escaped responsibility to Doane upon the note, unless it appeared that the latter did not become a *bona fide* holder for value.

The result is, that, under the evidence, Doane must have been deemed a holder for value. No other inference from the evidence could reasonably have been made. Having, then, purchased the original note for value, Doane was entitled to recover the amount of the renewal note, unless it appeared that he purchased the original note with knowledge of the fraud alleged to have been committed against King, or with such notice of the facts and circumstances attending its execution that his purchase of it must be deemed to have been

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made, not simply without due care, but in actual bad faith. As such knowledge or notice was not shown, and could not be reasonably inferred from the evidence, the direction to the jury to find for the plaintiff was proper.

Judgment affirmed.

STOCKMEYER *v.* TOBIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 143. Argued and submitted January 12, 1891. — Decided March 2, 1891.

An averment in a bill, filed by the curator of an interdict in Louisiana to have a contract declared null and void, that at the time of making it the interdict was losing, and to a great extent had lost, his capacity to attend to business and to manage his affairs, and that his mind was seriously impaired so as to affect his understanding and judgment, and so continued until he was judicially interdicted, does not meet the requirements of the Civil Code of that State, and does not entitle the plaintiff to relief upon the ground that the interdict was then incapable in law of making a binding agreement.

In Louisiana a judgment debtor can waive or renounce the right to have property, which is taken on execution to satisfy the judgment, appraised.

The right of appraisement of property taken on execution is given in Louisiana to the owner, and, if waived by him, his creditors cannot complain unless the waiver was made fraudulently and to defeat their debts.

When a mortgage in Louisiana stipulates for a sale, on forfeiture, without appraisement, and the petition for executory process prays for such a sale, and the order is "let executory process issue herein as prayed for and according to law," it imports a sale without appraisement.

When a plantation in Louisiana and its fixtures are to be sold under a mortgage, the sale must be made at the seat of justice, unless the debtor, within the time after the seizure prescribed by law, requires it to be made on the plantation.

In Louisiana, when a plantation and the personal property upon it are mortgaged together by one mortgage, they may be sold together as an entirety.

In Louisiana mere informalities or irregularities in a judicial sale do not constitute a sufficient ground for setting it aside.

THE case, as stated by the court, was as follows:

This suit was instituted January 27, 1886, in the name of Edward F. Stockmeyer, an interdict, and a subject of the Ger-

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man Empire, residing in New Orleans, by his curator Carl Stockmeyer, a subject of the same empire, residing in that city, against Charles P. McCan, Henry Godberry, George Godberry, Laura Godberry, Noelie Godberry and Edward F. LeBourgeois, citizens of Louisiana. Upon final hearing the bill was dismissed with costs.

Its principal object is to obtain a decree setting aside and declaring of no effect a sale and adjudication in the year 1885 to Charles P. McCan of a certain plantation in Louisiana, with all the buildings, improvements, and houses thereon, and sundry articles of personal property used in its cultivation, and establishing the rights and interests secured to Edward F. Stockmeyer by certain pledges made by public acts in the years 1881 and 1884. A further object is a decree declaring McCan a trustee in respect to the moneys realized by him from the sale of property taken possession of under the above adjudication.

The grounds upon which the above relief is sought will appear from the following summary of the pleadings and evidence:

On the 7th of February, 1881, by public act before a notary, the defendants Laura Godberry and Noelie Godberry pledged to Stockmeyer, his heirs and assigns, two promissory notes made by Henry Godberry and George Godberry to their own order and by them endorsed, dated February 20, 1880, each for the sum of $8750, payable one year after date, with interest at the rate of six per cent per annum from date until paid, with privilege to the makers of extending the notes from year to year upon payment of interest. These notes were secured by mortgage and vendor's privilege, given February 20, 1880, on a sugar plantation known as the Angelina plantation in the parish of St. John the Baptist, State of Louisiana, about forty-eight miles above the city of New Orleans on the Mississippi River.

On the 25th of January, 1884, Laura Godberry and Noelie Godberry, by public act, and for the purpose of securing an indebtedness from Henry and George Godberry in the sum of $32,000, with interest at 8 per cent per annum from February

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24, 1884, until paid, and attorney's fees at 5 per cent on the amount sued for, pledged to said Stockmeyer the above two promissory notes. By this act it was agreed between Laura and Noelie Godberry and Stockmeyer that, in the event Henry and George Godberry failed to pay this indebtedness, with interest and costs, on or before January 25, 1885, Stockmeyer, his heirs and assigns, might take such legal proceedings as were deemed necessary to enforce the payment of the notes pledged, and appropriate the proceeds of sale to the payment of any amount due him on account of the Angelina plantation. The interest was paid to February 21, 1884, and payment of the notes was postponed to January 25, 1885. The land and property embraced in this special mortgage and vendor's privilege was the Angelina plantation, with the buildings, improvements, machinery, engines, apparatus, carts, wagons, tools, implements of husbandry, mules and other live stock, corn, fodder, growing crops, and everything, without exception or reservation, belonging or appertaining to that plantation.

On the same day of the last-named act, January 25, 1884, by public act, to which Henry Godberry, George Godberry, Laura Godberry, Noelie Godberry, Edward F. Stockmeyer and Charles P. McCan were parties, certain notes for $25,000, made *in solido* by Henry Godberry and George Godberry to their own order and by them endorsed, divided into sums of $5000 each, and payable at the New Orleans National Bank on the 15th, 20th and 27th days of December, 1884, and on the 5th and 15th days of January, 1885, respectively, with interest at six per cent per annum after maturity, were secured by special mortgage and crop lien on the Angelina plantation and the personal property belonging thereto, as an entirety, in favor of McCan. This mortgage, by its terms, was made superior to the one of the same date securing the indebtedness of Henry and George Godberry to Stockmeyer, as well as to that of February 20, 1880, securing the two notes of $8750 each, held by the Misses Godberry.

Subsequently, by a decree passed November 11, 1884, in the Civil District Court of the parish of New Orleans, Stockmeyer was adjudged to be incompetent to perform validly any

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act that could be performed by a person of sane mind. He was, accordingly, interdicted and Carl Stockmeyer was appointed and qualified as his curator.

Upon default in the payment of one or more of these notes, McCan, the holder and owner of them, proceeded, February 25, 1886, by executory process, in the Twenty-sixth Judicial District Court, parish of St. John the Baptist, in suit No. 197 on the docket of that court, in which Henry Godberry and George Godberry were sole defendants, to seize the tract of land or plantation, together with all the personal property covered by the special mortgage to him and attached to and used in the cultivation of such plantation. At the sale ordered in that suit — which took place on the 7th of March, 1885, at the seat of justice of the parish — the plantation, with the personal property covered by the special mortgage and crop lien, and used in its cultivation, was adjudicated to Charles P. McCan for the price of $15,000 cash, and a deed was made to him by the sheriff. Under that deed, he entered into possession and sold the mules and machinery in the sugar house on the plantation for a sum approximating $10,000. He, subsequently, leased the plantation for the year 1885 to Edward Le Bourgeois for the sum of $5000, which sum he collected. He again leased it to Le Bourgeois for two years from January 1, 1886, for $10,000, and the latter, at the beginning of this suit, was in possession as lessee and tenant under McCan, whose title rested entirely on the above adjudication and deed to him.

Before the sale to McCan was made, the defendants in suit No. 197 presented to the judge of the Twenty-second Judicial District of Louisiana a petition protesting against the sale of the personal property in block or in lump at the court-house, and demanding that it be appraised and sold, separately, on the plantation. This petition was accompanied by an affidavit of counsel stating that the office of judge of the Twenty-sixth Judicial District Court of Louisiana was vacant; that there was no judge in that district or parish to act in said office, and that the judge of the adjoining district — the Twenty-second — was authorized in that event to act. Thereupon, the latter

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judge made at chambers, on the 4th of March, 1885, the following order: "Upon reading the foregoing petition and considering articles 666 and 676 of the Code of Practice, let the sheriff of the parish of St. John the Baptist be, and he is hereby, directed and instructed to sell the property described in the foregoing petition in the order and manner therein set forth; and let the same be sold separately and appraised separately, as above set forth and prayed in said petition; the plantation to be sold first at the court-house, and the other articles on the plantation, as above prayed for." This petition with the accompanying affidavit, and the above order, were filed in the suit, and of the order the sheriff was notified on the 5th of March, 1885. In addition, the curator of Stockmeyer, by a writing, filed March 6, 1885, in said suit No. 197, protested against the sale of the property without the benefit of appraisement, as prescribed by law, and in the mode claimed by Henry and George Godberry. Nevertheless, the property was sold at the court-house door, in block, without appraisement; by reason whereof, it is alleged, the sale did not realize a fair value, persons who would have been present and bid for the property being prevented from attending on account of the mode in which the sale was conducted. The act of special mortgage and crop lien of January 25, 1884, by Henry Godberry and George Godberry for the benefit of McCan, contained, among others, provisions dispensing with the appraisement of the property enumerated in the event of seizure and sale; waiving all delays, appeals, writs of error and right of appeal; authorizing the holder of the notes to enter judgment in any court of competent jurisdiction, without citation or previous notice, on a production of an authentic copy of the act, for the whole or part of said debts, attorneys' fees, costs, charges, expenses, etc., provided execution was stayed until the maturity of the notes sued on; in case a forced sale became necessary from any cause, waiving and acknowledging legal service of notice to pay, notice of seizure and notice to appoint an appraiser and to subdivide, as well as all legal delays; consenting to the immediate execution of any judgment entered; promising that no injunction or process of law

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tending to delay a sale should be resorted to by them, or by any one holding under them, such right or privilege being expressly renounced; consenting that all laws of the State pertaining to privileges for supplies furnished or money advanced and used in the purchase of necessary supplies, and in the payment of necessary expenses, laborers, etc., to carry on a farm or plantation, should have full force and effect; and obligating themselves to ship and consign to the mortgagee the entire crop of sugar and molasses made and gathered on the Angelina plantation during the year 1884, or his representative and assigns could at once sequester the crops or the proceeds thereof, in whosesoever hands the same might be, regardless of any sale or transfer thereof, and ship the same, if in kind, to McCan, who was empowered to sell them at the current market prices and hold the net proceeds in lieu of the property sequestered.

These stipulations, in the special act of mortgage and crop lien, were alleged to be illegal and not binding upon Henry and George Godberry, or through them upon any creditor or junior mortgagee, particularly the plaintiff or said interdict, even if the latter was adjudged to have lawfully signed it, which the plaintiff denied.

The bill avers that the defendants Laura and Noelie Godberry, at the date of the above act, January 25, 1884, were not the holders and owners of the two promissory notes for $8750 each, but that they had been pledged to Stockmeyer, first by the act of February 7, 1881, and again by the act of January 25, 1884, and that he held a special property in them to secure his debt; that the special act of mortgage and crop lien of the latter date was not intended to subordinate the pledge of Stockmeyer to the claim and notes of McCan, and could not properly be so interpreted; that there was no consideration for Stockmeyer to subordinate his right of pledge to the special mortgage and crop lien of McCan; that at that time, January 25, 1884, Stockmeyer "was losing and, to a large extent, had lost his capacity to attend to business and to manage his affairs; that his mind was seriously impaired so as to affect his understanding and judgment, and he so continued until in

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the month of November, 1884," on the 11th day of which month he "was judicially interdicted, but on or about the 20th day of February, 1884, previous thereto, was placed in an asylum;" that "said act was not the expression of a sound mind and is illegal and void and not binding on Stockmeyer, his heirs or assigns, and that the proceeding to seize and sell the property therein enumerated was illegal, void and of no effect" as to his rights or the rights of his curator; that if the special mortgage be illegal and void as against him, the pledges, one or both, made by Laura Godberry and Noelie Godberry on the 7th of February, 1881, and January 25, 1884, were subsisting pledges and first mortgages and privileges on said property; and that the debts due to Stockmeyer should be first paid from the proceeds of the sale of the property pledged.

The prayer of the bill is that the sale and adjudication of the Angelina plantation, as well as said act of special mortgage and crop lien in favor of McCan, be cancelled and declared null and void; that the pledges by the act of February 7, 1881, and January 25, 1884, be recognized and established, and the property so pledged be sold; that the debts due Stockmeyer from Henry and George Godberry be ascertained; that McCan be adjudged to be a trustee for the moneys realized by him from the sale and adjudication of March 7, 1885; and that such further relief be granted as the nature of the case requires.

The answer of McCan proceeds upon these grounds: That the two acts of January 25, 1884, were executed at the same time and for a common purpose; that prior to that date, Stockmeyer made advances to the amount of $32,000 to Henry and George Godberry to enable them to carry on the Angelina plantation; that said debtors, being unable to repay said sum, and there being no prospect of their being able to do so unless the sum necessary was made out of future crops, applied to defendant some days before January 25, 1884, for a loan of $25,000 to be used in purchasing supplies for that year, and to be secured by a first mortgage; that Stockmeyer knew of and approved of that application, for he intervened

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in the act of special mortgage and crop lien, without solicitation from the defendant, and bound himself to the stipulations contained in it; that defendant refused to make the loan unless the holders and owners of the two notes of $8750 each, which were outstanding and secured by first mortgage on the plantation, would consent to give his mortgage priority over them; that by said stipulation the plaintiff postponed his rights of mortgage in favor of the defendant; that the protest and petition filed by the curator in case No. 197 shows that Stockmeyer became a party to the act of mortgage and crop lien for the purpose of waiving his claim as holder of said two notes; that prior to, as well as on, the 25th of January, 1884, he was engaged in and transacted business in New Orleans, apparently in the full enjoyment and use of all his mental faculties, and defendant had no reason to believe that they were, in any degree, impaired by insanity, or from any other cause; that the defendant has no knowledge or information as to his having lost his capacity to attend to business and manage his affairs, or as to whether his mind was seriously impaired so as to affect his understanding and judgment; that defendant was not intimate with him, having had only casual intercourse with him, but from the fact of his attending to business, he believed him to be in his right mind when the mortgage and crop lien were executed; that on or about September 27, 1884, his curator agreed and consented to defendant's making further advances to the plantation over and above the $25,000 secured by the special mortgage of January 25, 1884; that no infirmity of intellect upon the part of Stockmeyer was suggested by the curator in the petition and protest filed to prevent the sale of the mortgaged property; and that if the curator had given notice of his purpose to repudiate the stipulation in the act of special mortgage on the grounds now urged, the defendant would not have made the advances he did, nor would he have sold the property in dispute, if the claims now put forward had been made known to him.

The answer also alleges that the sale of the mortgaged property by the sheriff, under executory process, was in all respects legal and valid; that it was competent for the

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mortgagors to make the waivers embodied in the mortgage, and the mortgage having been signed, he consented to its terms and conditions, and is bound by them; that the mules and other personal property covered by the special mortgage, and not sold on the plantation, were used in the cultivation of the plantation, were attached thereto, and were immovable by destination; that the sheriff had advertised the same, together with the plantation of which they formed a part, for sale, according to law, at the seat of justice of the parish; that the petition and protest of the plaintiff, who was joined therein by Laura Godberry and Noelie Godberry, were filed long after the seizure and date of the first publication of the notices of sale, and was not a demand for a sale of the seized property, or any part thereof on the premises, but if it be so construed, it was made after the right to the same had expired, and not by the defendants in the writ, and the sheriff was not bound to comply with any such notices; that it would have been irregular and illegal to have sold a part of the property at a place different from that named in the notice of sale; that the protest was presented to the defendant on the day, and only a few minutes before the time advertised for the sale; that, as the plantation was on the opposite side of the river, ten miles from the seat of justice, the plaintiff knew that compliance with the protest was impossible; that the judge who granted the order directing the sheriff to sell according to the terms of the protest, had no power to grant the same; that the petition upon which it was granted did not pray for process against the sheriff or the defendant, nor has any been issued or served, and the suit has not been prosecuted in any manner to final judgment; that such order decided nothing between the defendant and the complainant that ought to affect the sale; that the plantation, mules, machinery and implements thereon constituted an estate complete for the purpose of cultivating sugar cane and manufacturing its products, and it was more valuable as a whole than it would have been if sold separately in the manner set forth in the protest; that the amount due him, on the day of sale, for advances, was $20,707.39, with legal interest from January 10, 1885; but that the property was sold for

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only $15,000, leaving a large balance due him, which remains unpaid, together with accrued interest.

The defendant admits that he received from Le Bourgeois $4000 for the rent of the property for the year 1885; that he has rented for two years from January 1, 1886, at $5000 per annum; and that he has given Le Bourgeois the privilege of purchasing at the expiration of his lease for $15,000, payable in instalments. After the answer was filed both Edward F. Stockmeyer and McCan died, and the suit was revived in the name of C. Stockmeyer, testamentary executor of E. F. Stockmeyer, against the appellees, the widow and children of McCan. Upon final hearing the bill was dismissed with costs.

Mr. Alfred Goldthwaite for appellant submitted on his brief.

Mr. J. D. Rouse for appellee. *Mr. William Grant* was with him on the brief.

Mr. Justice Harlan, after making the above statement, delivered the opinion of the court.

The case will be considered in the two aspects in which it is presented in behalf of the appellant. The first one is, that at the time Edward F. Stockmeyer entered into the agreement of the 25th day of January, 1884, before the notary, he was in a condition of great mental weakness; that there was gross inadequacy of consideration for the mortgage; and that from these circumstances imposition or undue influence ought to be inferred.

The bill does not allege that Stockmeyer was incapable, in law, of executing the agreement in question. The averment that at the time of making it he was losing, and to a great extent had lost, his capacity to attend to business and to manage his affairs, and that his mind was seriously impaired so as to affect his understanding and judgment, and so continued until he was judicially interdicted by a judgment rendered November 11, 1884, does not meet the requirements of the Civil Code of Louisiana. By that Code it is provided:

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"Art. 401. All acts done by the persons interdicted from the date of the filing of the petition for interdiction until the day when the same is pronounced are null. Art. 402. No act anterior to the petition for interdiction shall be annulled, except where it shall be proved that the cause of such interdiction notoriously existed at the time when the acts, the validity of which is contested, were made or done, or that the party who contracted with the interdicted person could not have been deceived as to the situation of his mind. Notoriously, in this article, means that the cause of the interdiction was generally known by the persons who saw and conversed with the party. Art. 403. After the death of a person, the validity of acts done by him cannot be contested for cause of insanity, unless his interdiction was pronounced or petitioned for previous to the death of such person, except in cases in which the mental alienation manifested itself within ten days previous to the decease, or in which the proof of want of reason results from the act itself which is contested."

Other articles of the Code are as follows: "Art. 1782. All persons have the capacity to contract except those whose incapacity is specially declared by law. These are persons of insane mind, those who are interdicted, minors and married women. Art. 1783. All cases of incapacity are subject to the following modifications and exceptions. Art. 1784. Persons interdicted can, in no case whatever, make a valid contract after the petition has been presented for their interdiction until it be legally removed. Art. 1788. The contract, entered into by a person of insane mind, is void . . . for want of consent. It is not the judgment of interdiction, therefore, that creates the incapacity, it is evidence only of its existence, . . . and from these principles result the following rules: 1. That, after the interdiction, no other evidence than the interdiction itself is necessary to prove the incapacity of the person, and to invalidate any contract he may have made after the day the petition for interdiction was presented . . . 2. As to contracts made prior to the application for interdiction they can be invalidated by proving the incapacity to have existed at the time the contracts were made. 3. But in order to pre-

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vent imposition, it is not enough to make the proof mentioned in the last rule; it must also, in that case, be shown that the person interdicted was known by those who generally saw and conversed with him, to be in a state of mental derangement, or that the person who contracted with him, from that or other circumstances, was acquainted with his incapacity. 4. That, except in the case of death, hereafter provided for, no suit can be brought . . . to invalidate a contract on account of insanity, unless judgment of interdiction be pronounced before bringing the suit. . . . 5. That if the party die within thirty days after making the act or contract, the insanity may be shown by evidence, without having applied for the interdiction; but if more than that time elapse, the insanity cannot be shown to invalidate the act or contract, unless the interdiction shall have been applied for, except in the case provided for in the following rule: 6. That if an instrument or other act of a person deceased contain in itself evidence of insanity in the party, then it shall be declared void, although more than thirty days have elapsed between the time of making the act and the death of the party, and although no petition shall have been presented for his interdiction. 7. In the case mentioned in the preceding rule, other proofs of insanity may be offered, etc. 8. That where insanity is alleged to avoid a donation or other gratuitous contract, it is not necessary to show that the insanity was generally known; it will be sufficient to show that it existed, and if the party be dead, without having been interdicted, it is not necessary to show in this case that interdiction had been applied for."

It is apparent from these provisions that the allegations of the bill as to the condition of Stockmeyer's mind on the 25th of January, 1884, do not entitle the plaintiff to relief upon the ground that he was incapable in law of making a binding agreement. And the proof fails to show that the persons who at that time generally saw and conversed with him, knew or even believed him to be in a state of mental derangement, or that McCan had any ground whatever to doubt his capacity to contract. *Louisiana Bank* v. *Dubreuil*, 5 Martin, 416, 425;

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Phelps v. *Reinach*, 38 La. Ann. 547. On the contrary, the evidence shows that when he intervened in the McCan mortgage, he was, although of peculiar and at times eccentric manners, not incompetent for the transaction of business. He recognized the fact that Henry and George Godberry needed more money to carry on their plantation, and that, unless they obtained it, his interests under the prior pledge would be put in peril. He was not himself able to make further advances, and approved, if he did not suggest, that application be made for that purpose to McCan. The latter agreed to make advances for the current year only upon the condition, among others, that his mortgage and crop lien should take precedence of all others. This Stockmeyer perfectly understood and distinctly assented to with full apprehension of what he was doing. And that condition was plainly expressed in the contract; for it is therein stipulated that the mortgage and privilege then existing for the two notes for $8750 each, as well as for the indebtedness to Stockmeyer of $32,000 for and on account of advances to the Angelina plantation, were "subordinate" to the McCan notes and mortgage. The testimony of the notary before whom the McCan mortgage was executed is positive to the effect that, at that time, there was nothing peculiar in Stockmeyer's conversation, and that he presented the same appearance as on several previous occasions when transacting business with that officer. The truth is, that Stockmeyer's mind did not commence to give way, so far as his friends could perceive, until within a few days — not more than a week or ten days — prior to February 20, 1884, when he was transferred to the Louisiana Retreat for the Insane. The physician who examined him on that day, and by whose advice he was removed to that institution, testified that he was engaged in the transaction of his business all the time until about a week before being committed to the asylum. Undoubtedly he was, on and after that date, incapable of making a binding contract. But we are not to infer incapacity to have existed on the 25th of January, 1884, from the mere fact that he became insane within a few days before his removal to the asylum for treatment.

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The suggestion that there was gross inadequacy of consideration is without force. Stockmeyer consented that his mortgage be subordinated to McCan's, because, in his judgment, further advances to the plantation could not be otherwise obtained, and without such advances he supposed, and reasonably, that it would run to waste, destroying all chance to save his debt. Besides, the advance by McCan, in consideration of his mortgage being accorded priority, was enough to sustain the agreement to that effect.

After a close scrutiny of all the evidence we are of opinion that nothing is disclosed to support the contention, that the McCan mortgage and crop lien were obtained by imposition or undue influence. No such inference is justified by the evidence.

The other aspect in which the case is presented by the appellant involves the validity of the sale by the sheriff under the proceedings for executory process. The first point made in support of this general contention is that the clause in the McCan mortgage, dispensing with appraisement, was not valid or binding under the laws of Louisiana; that, without appraisement, a legal sale could not occur. Under the Louisiana law, Code of Practice, 1870, art. 745, "when the Sheriff sells property which he has seized conformably to the provisions contained in this chapter [relating to executory process], he must cause the same appraisements to be made, and observe the same delays and formalities, as are prescribed for the sale of property seized in execution." The latter sales are provided for in Article 663 to 704 inclusive of the Code. In *Levicks, Barrett & Kuen* v. *Walker*, 15 La. Ann. 245, — a case much relied upon by the appellant — the suit was upon a note executed in Pennsylvania, the maker describing himself as residing in Louisiana, and promising to pay, without defalcation, and "without any relief whatever from appraisement or valuation laws." Judgment, in that form, was refused, and the plaintiff appealed. Chief Justice Merrick, in affirmance of the judgment, said: "We think the stipulation in a contract that the property of the debtor shall be sold without appraisement in the event of non-payment at maturity, one of those pacts which ought not

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to be recognized by our courts in the decree rendered upon such contract. The law has, by express provisions, ordained the mode in which its own officers shall enforce the judgments of the courts." Justices Land and Buchanan held that the right of the debtor to appraisement in case of the forced alienation of his property might be waived by him, and his property sold at the first offer for cash for whatever price it would bring. But they concurred in the judgment of affirmance because "the waiver in such a case must be in a more solemn and authentic form than that of a promissory note, otherwise the waiver would become a mere *formula* in such instrument, and the entire policy of the law would thereby be defeated, to the injury of both debtors and creditors."

The subject was elaborately considered by the Supreme Court of Louisiana in *Broadwell* v. *Rodrigues*, 18 La. Ann. 68, where the question was whether the clause inserted in the act of mortgage there in suit, dispensing with the appraisement required by Arts. 673 and 745 of the Code of Practice, was valid in law. The case turned upon the construction to be given to Article 11 of the Civil Code of Louisiana, providing that, "individuals cannot by their conventions derogate from the force of laws made for the preservation of public order or good morals. But, in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others and is not contrary to the public good." It was contended on one side, that the law requiring the property of a judgment debtor to be appraised before it could be sold by the sheriff in execution of a judgment, is a public law, and that an agreement to waive or dispense with the appraisement is absolutely void; and on the other, that the necessity for appraisement in judicial sales is established exclusively for the benefit of the defendant, and that he may, therefore, validly renounce it under the second paragraph of Article 11 of the Civil Code. The court said: "From the general tenor of our own jurisprudence, we could hardly have deemed this question an open one, for it has been uniformly held that the legal formalities attending final process are

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established by law in favor of debtors in execution, which they can renounce, without in any manner running counter to the proviso in the second paragraph of Art. 11, C. C. The cases to which our attention has been called view the question in all its phases, and seem to consider the progressive steps in the execution of judgment as mere formalities; less a matter of public policy than of private concern, and hence they deem the renunciation or waiver of those rights as permissible under § 2 of Art. 11 of the Civil Code." The prior cases referred to in the opinion as sustaining these views were *Mullen* v. *Harding*, 12 La. Ann. 271; *LeBlanc* v. *Dubroca*, 6 La. Ann. 360; *McDonough* v. *Garland*, 7 La. Ann. 143; *Desplate* v. *St. Martin*, 17 La. Ann. 91, 92, and others. To the same effect are *Jouet* v. *Mortimer*, 29 La. Ann. 206; and *Soniat* v. *Miles*, 32 La. Ann. 164. So, that the objection that the sale was illegal for want of an appraisement is without any foundation upon which to rest.

But it is said that the Godberrys could not by their agreement with McCan waive appraisement so as to affect Stockmeyer or the vendor's mortgage and privilege securing the notes that had been pledged to him. This contention, it is supposed, finds support in Article 2078 of the Revised Civil Code, providing that "several obligations are produced, when what is promised by one of the obligors is not promised by the other, but each one promises separately for himself to do a distinct act; such obligations, although they may be contained in the same contract, are considered as much individual and distinct as if they had been in different contracts and made at different times." To this suggestion it is sufficient to answer that the right of appraisement is given by the statute to the owner, and its waiver by the Messrs. Godberry was not a matter of which creditors could complain, unless such waiver was made fraudulently or to defeat their debts, as in *Lawrence, Syndic* v. *Young*, 1 La. Ann. 297, 299; certainly not one of which any creditor could complain who intervened and became a party to the mortgage dispensing with appraisement.

It is also said, that in the writ commanding the sheriff to seize and sell, he was required "to seize, and, after the legal

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delays, to advertise and sell, *according to law;*" and that as he was not directed to sell *without appraisement*, he could only sell in the mode prescribed by the statute, that is, upon appraisement. *Union Bank* v. *Bradford*, 2 La. Ann. 416, is cited in support of that proposition. That was an action to annul a sale of land under execution by the sheriff. The mortgage, given by the defendants, contained a clause authorizing a sale "for cash, without appraisement." In the petition praying for the order of seizure and sale, no reference was made to this clause, and the right to sell without appraisement was not claimed. The prayer was for an order that the property be seized and sold "as the law directs," etc. An order of seizure and sale was directed to be issued, "as prayed for," and that the property be sold "as the law directs." Under this order, the clerk issued the writ, directing the sheriff to seize and sell for cash, without appraisement; and the sale was so advertised. The court said: "It is manifest that the sale was not made in conformity with the order of the judge. The stipulation in the act of mortgage was one made for the benefit of the plaintiffs, which it was discretionary with the bank to have enforced or to renounce. It was virtually waived by claiming a seizure and sale according to law, the true intendment of which is, that the proceedings were to be in conformity with the rules which govern seizures and sales under executory process. The order was in accordance with the prayer of the petition, and no sale could have been legally effected under it, without observing the formalities required in ordinary cases under executory proceedings, one of which is, that the property shall be previously appraised. The clerk was not authorized, under the order granted by the judge, to direct that the sale be made without appraisement. His act was null, and conferred no authority on the sheriff to dispense with the observance of a formality which was so essential, as the result proves, to the protection of the plaintiffs' rights." The facts here are entirely different from those in the above case. The petition of McCan for executory process asks that the mortgaged property be seized and sold for cash to the highest bidder, "without appraisement and according to law."

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The order upon the petition was, "Let executory process issue herein as prayed for and according to law." The writ of seizure and sale directed the sheriff "to seize, and, after the legal delays, to advertise and sell, according to law, . . . to pay and satisfy in cash the claim of the plaintiff," etc. The writ, it is true, did not in terms require the sale to be made without appraisement. But the omission was not one of which Stockmeyer could complain after intervening in the special mortgage to McCan; certainly not unless he showed special injury to his rights. Besides, we think, in view of the petition and order for executory process, the words "according to law" in the writ imported a sale in accordance with the stipulations of the mortgage and the prayer in the petition, namely, without appraisement. There is no ground to say, as in the case in 2 La. Ann., that the mortgagee, by his petition, or in any other mode, waived his right to a sale without appraisement and asked a sale under the statute with appraisement.

Another question is, whether the sale was invalid by reason of the entire property having been sold, in block, at the seat of justice, and not, as to any portion of it, on the plantation. By Article 664 of the Code of Practice it is provided that the sale of the property under a writ of *fieri facias* "must be made by the sheriff at the seat of justice for the parish where the seizure is made, and he shall choose for the place of sale the spot where it may have the greatest degree of publicity, except in the cases enumerated in the following articles." Art. 665: "In the country, the sale may be made on the plantations which are to be sold if the debtor require it; but in this case notice must be given of the fact in the advertisement of sale." Art. 666: "Animals and utensils attached to plantations and manufactures, and such articles as cannot be easily removed, must be sold on the spot where they are taken, on the day and hour appointed for this purpose by the sheriff." Art. 676: "The effects seized must be appraised with such minuteness that they may be sold together or separately, to the best advantage of the debtor, as he may direct."

Now, the objection as to the place of sale is fully met by *Walker* v. *Villavasso*, 26 La. Ann. 42, 44, (decided in 1874)

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where the court, after quoting Article 666, said: "The two preceding articles [664, 665] provide that sale of the property must be made at the seat of justice, but in the country it may be made on the plantations which are to be sold, if the debtor require it, of which notice must be given in the advertisement. These articles must all be construed together so as to give effect to each. Where a plantation and its fixtures are to be sold under a mortgage, as in this case, the sale must be made at the seat of justice, unless the debtor require it to be made on the plantation. It is not intended that the articles attached to the plantation and which are mortgageable shall be sold in one place and the land in another. Under the writ of seizure and sale all are seized and sold at one time and place." And, perhaps, that the privilege given to the debtor might not be abused, the general assembly, by the act of March 2, 1876, relating to sales by sheriffs and coroners, Laws of La. 1876, p. 50, declared that nothing therein contained "shall deprive the defendant of the privilege now enjoyed by him of having his property, when it is under seizure, offered for sale at his domicil upon his giving notice to the proper officer within three days after seizure." The necessity for this limitation as to the time within which the defendant must indicate his wishes as to the place of sale is shown by the occurrences in this case. The petition of McCan was filed and executory process directed to be issued on the 15th of January, 1885. Notice of demand and service of copy of petition were waived by the debtors January 19, 1885; the seizure was made January 27, 1885; the sale was advertised January 31, 1885, to take place March 7, 1885, the advertisement stating that the plantation and the personal property attached to it, and used in its cultivation, would be sold for cash at the court-house of the parish; and a copy of the petition of protest by debtors, with the accompanying affidavit, and the order of the judge of the 22d Judicial District, requiring the plantation to be sold at the court-house, and the other articles at the plantation, was not served on the sheriff until March 5, 1885, three days only before the day on which the sale was to occur according to the advertisement. It thus appears that, in any

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view of the statute, the demand for the sale of the personal property on the plantation, apart from the plantation, was out of time.

As to the effect upon the sale of the order made at chambers by the judge of the Twenty-second Judicial District, directing that the personal property covered by the McCan mortgage be appraised and sold separately on the plantation, but little need be said. Touching this order it may be observed that the counsel for the appellant does not refer to any statute of Louisiana conferring upon the judge who made it the power to act in any case pending in another district, in which there is an actual vacancy in the office of judge; while the counsel for the appellees say that if any authority exists for the exercise of such a power they have been unable to find it in the laws of that State. It does not seem to us that this order, made without citation or prayer for citation against the party to be affected by it, can have the force of a judgment, nor did it authorize the sheriff to depart from the terms of the advertisement of sale, in respect either to the place of sale or the mode of conducting it. In view of the terms of the advertisement, a sale in conformity with the above order, without readvertisement, would have been irregular, if not invalid. This order is liable to the same objection as the one before this court in *Freeman* v. *Dawson*, 110 U. S. 264, 270, of which it was said: "The action of the circuit judge in directing the recall of the executions in vacation, out of court, without notice to the judgment creditor, was irregular and unauthorized, and of no legal validity."

It is contended with much earnestness that the sale of the personal property in a lump, along with the plantation, was unauthorized by the statute and void. We are not satisfied of the soundness of this view. In *Morris* v. *Womble, Sheriff*, 30 La. Ann. 1312, 1314, the question was, whether the debtor, who had specially mortgaged his plantation, with all the buildings and improvements thereon, was entitled, of right, to have the plantation sold in lots. The court, after observing that, in the case of a *fi. fa.* on an ordinary judgment, the debtor has the right to point out the property he desires sold, provided it

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be available and sufficient, says: "But the case we conceive to be very different where the debt for which the sale is made bears special mortgage on the thing to be sold, and where the thing has been mortgaged as *an entirety, a unit*, and thus made by contrast and in contemplation of the parties *indivisible*, whether so by nature or not." "Thus," the court proceeds, "where a plantation, with its accessories, has been specially mortgaged, the stock, implements, etc., thereto attached by the owner, and therefore made immovable by accession, cannot be sold separately from the plantation itself, no more than can a house or other building on it. When the law gives the mortgage creditor the right to seize the whole thing mortgaged, it gives him the right to sell the whole thing, if it be indivisible by nature or only so by the agreement and contract of the parties."

But if it be assumed that the personal property used in the cultivation of the plantation, and embraced in the special mortgage, ought not to have been sold in block with the plantation, but each article separately, the failure to do so did not render the sale void. The utmost that could be said is that the sale was informal and irregular. But in Louisiana mere informalities or irregularities in a judicial sale do not alone constitute a sufficient ground for setting it aside. The bill alleges that the property did not bring a fair value, and that, by reason of the mode of sale, persons who would have bid did not attend, and were prevented from bidding. These allegations, if material, are not sustained by proof. Nor is there sufficient proof that the property, if resold, would bring any larger price than McCan bid for it, or would be sufficient to discharge his claim in full. The plaintiff does not propose that he, or any one else, will, at a resale, bid any larger sum than McCan paid. Nor have the Godberry brothers, since the sale, made complaint of unfairness in it. Under such circumstances, it not appearing that any real injury has been done to the plaintiff, the sale should not be disturbed because of omissions or informalities that did not affect the substantial rights of the party complaining. In *Copeland* v. *Labatut*, 6 La. Ann. 61, the court said: "The petition contains no alle-

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gation and the record no proof of any injury having been sustained by the plaintiff, in consequence of the informalities alleged; and no offer on the part of the plaintiff to warrant that the property, if resold, would bring a higher price than it did before. Under the rule which we have found it necessary to adopt, those omissions would prevent us from disturbing the judgment, even if the informalities were much more material than they actually are." So, also, in *Mullen* v. *Harding*, 12 La. Ann. 271–2: "Unless the plaintiffs can show that they have suffered injury by the informalities complained of, they ought not to be permitted to attack the validity of the proceedings." *Barret* v. *Emerson*, 8 La. Ann. 503, 504; *Stockton* v. *Downey*, 6 La. Ann. 581, 585; *Coiron* v. *Millaudon*, 3 La. Ann. 664; *Desplate* v. *St. Martin*, 17 La. Ann. 91, 92; *Seawell* v. *Payne*, 5 La. Ann. 255, 260.

Decree affirmed.

CALLAN v. BRANSFORD.

JONES v. VIRGINIA.

GREGORY v. BRANSFORD.

MALLAN v. BRANSFORD.

LAWSON v. BRANSFORD.

LITCHFORD v. DAY.

ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

DILLARD v. MOORMAN.

ERROR TO THE CORPORATION COURT OF LYNCHBURG, VIRGINIA.

Nos. 1271, 1594, 1595, 1596, 1597, 1598, 1638. Submitted March 2, 1891.—Decided March 9, 1891.

When the highest court of a State dismisses a case upon the ground that the matters involved were purely pecuniary, and that the amount in controversy was less than sufficient to give the court jurisdiction under the constitution of the State, no federal question arises.

When the court cannot pass upon a motion to dismiss without referring to the transcripts on file, it will deny the motion without prejudice.

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MOTION to advance, and motion to dismiss. The case is stated in the opinion.

Mr. W. A. McKenney and *Mr. W. W. Larkin* for the motion to advance, and against the motion to dismiss.

Mr. R. Taylor Scott for the motion to dismiss and against the motion to advance.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

These cases are brought here by writ of error to the Supreme Court of Appeals of the State of Virginia, except *Dillard* v. *Moorman*, No. 1638, which is a writ of error to the Corporation Court for the city of Lynchburg. A motion is now made by plaintiff in error to advance, and a motion to dismiss on behalf of defendant in error. It appears from the motion papers that *Callan* v. *Bransford, Treasurer*, No. 1271, was carried to the Court of Appeals on writ of error to the Corporation Court of the city of Lynchburg, and that *Gregory* v. *Bransford, Treasurer*, No. 1595, *Litchford* v. *Day, Sergeant, &c.*, No. 1598 and *Lawson* v. *Bransford, Treasurer*, No. 1597, were taken to that court by appeal.

The writ of error in the one case, and the appeals in the three others, were dismissed by the Court of Appeals upon the ground that the matters involved were purely pecuniary, and that the amount in controversy in each case was less than sufficient to give the court jurisdiction under the constitution of the State. This being so, we are of opinion that the writs of error to that court must be dismissed, and it will be

So ordered.

The motion papers in *Jones* v. *The Commonwealth*, No. 1594, *Mallan Bros.* v. *Bransford, Treasurer*, No. 1596, and *Dillard* v. *Moorman, Treasurer*, No. 1638, are not such that we can pass upon the motions to dismiss without referring to the transcripts on file, which we ought not to be obliged to do. These motions and the motions to advance will be

Denied, but without prejudice.

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HOWARD v. STILLWELL AND BIERCE MANUFACTURING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 180. Argued January 30, 1891. — Decided March 16, 1891.

The failure to note an objection to a deposition, based upon the form of the commission or the manner of executing it, when the deposition is taken, or to present the objection by a motion to suppress, or by some other notice before the trial begins, will be held to be a waiver of it.

In an action to recover the contract price for putting up mill machinery, anticipated profits of the defendant resulting from grinding wheat into flour and selling the same, had the mill been completed at the date specified in the contract, cannot be recovered by way of damages for delay in putting it up.

As a general rule, subject to well established qualifications, anticipated profits, prevented by the breach of a contract, are not recoverable as damages for such breach; but, where such profits, which would have been realized had the contract been performed, and which have been prevented by its breach, are not open to the objection of uncertainty or remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into, they are so recoverable.

THIS was an action at law by the Stillwell and Bierce Manufacturing Company, an Ohio corporation, having its principal place of business at Dayton in that State, against W. C. Howard, S. T. Stratton and J. Rauch, citizens of Texas, to recover a balance due on a contract in writing entered into between the parties hereto, March 23, 1885, for the reconstruction by the company of a flour-mill owned by the defendants in Dallas, Texas.

The contract provided, among other things, that the party of the first part (the company) should reconstruct the mill of the defendants, upon the roller system, by placing therein certain specified machinery, and "all other machinery and material necessary to erect and complete a flour mill of two

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hundred barrels' capacity in twenty-four hours, according to plans to be made by the party of the first part, and to be placed by them in the mill-house to be built by the party of the second part in Dallas, Texas; party of the second part to furnish proper motive power to drive said machinery, and to extend engine-shaft into basement of mill-house to a point to be hereafter designated by party of first part, and not to exceed eight feet inside of basement wall. Party of the second part are to build all stone or brick foundations for machinery, and frame all openings in floor for packers, upright shafts, etc. The party of the first part agrees to have the mill completed and ready to run on or before July 15, 1885, provided party of the second part shall have mill-house ready by June 1, 1885. The said party of the first part guarantees that said mill when completed shall have a capacity for from two hundred or more barrels of flour in twenty-four hours; and that the result shall be equal to those of any of the roller or other modern systems of milling now in use in this country using the same grades of wheat. The said party of the first part shall perform all the millwright work, which shall be done in a good and workmanlike manner, and shall furnish all materials therefor, except such as are now in said mill and can be utilized, which may be used free of charge by said party of the first part; and the said party of the second part hereby covenants and agrees to pay the said party of the first part for said machinery, materials and labor the sum of seventeen thousand eight hundred and fifty dollars, as follows: $7000 cash on shipment of said machines, and $7000 in nine months from date of shipment of said machinery; $3850 in twelve months from date of shipment of said machinery. Party of the second part to keep the mill insured for the benefit of party of the first part as their interest may appear in case of fire, for which said party of the second part agrees to execute and deliver promissory notes to said party of the first part, dated time of shipment of machinery, bearing eight per cent interest, and secured as follows: To be satisfactory to the parties of the first part. No claims for damages shall be made by said party of the second part on account of delays incident to starting up. The

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said party of the second part agrees to be responsible for any damage or loss by fire or otherwise after the machinery reaches Dallas. The title of said machinery shall remain in and not pass from said party of the first part until the same is paid for and until all the notes, whether secured or unsecured, given therefor, are fully paid, and in default of payment, as above agreed, said party of the first part, or its agent, may take possession of and remove said machines without legal process."

The amended petition filed January 31, 1887, alleged that the plaintiff had performed its part of the contract; that the defendants had paid the first payment of $7000 at the time it fell due, but that they had not paid the two deferred payments which were then past due; and that they had refused to execute their notes for the deferred payments, according to the contract. The plaintiffs prayed judgment for the sum of $10,850, the amount of the deferred payments, with eight per cent interest from May 26, 1885, the date of the shipment of the machinery.

The defendants filed a general denial, and also a plea in reconvention under the laws of Texas. This plea denied that the plaintiff had performed its part of the contract, and sought a recovery from it of the amount of losses caused by such failure of performance. The plea further alleged that the company did not have the mill completed within the time prescribed by the contract; that it did not furnish the machinery nor complete the mill within a reasonable time, or in a workmanlike manner as required by the contract, or furnish all the machinery contracted for; and that not only did the company delay the work beyond the contract time, but, in addition to such breach of the contract, it left the mill in so incomplete a condition that the defendants, at considerable expense to themselves, had to rectify the errors made by the company and complete the work as it had been contracted to be performed. An amended plea continued as follows: "That there was a ready cash market in Dallas all this time for flour of the grade said mill would have made if constructed as plaintiff had agreed it should be, and defendants could have sold all of said flour it could have made during said unneces-

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sary delays caused by plaintiff, viz. 200 barrels per day, and that plaintiff, by reason of the facts above stated, delayed defendants in the manufacture of said flour for sixty days, by which defendants lost a profit of $1 per barrel on 12,000 barrels of flour, or the sum of $12,000." The defendants accordingly demanded judgment against the plaintiff for the sum of $20,000.

The case came on for trial before Judge McCormick and a jury, on the 8th of February, 1887. On that day the defendants moved to suppress the deposition of William Odell, the foreman of the plaintiff company in the reconstruction of the mill, taken at Rochester, New York, for the purpose of showing that the delay of the plaintiff in completing the mill was caused by the defendants not having the building completed and ready for the machinery when the same was shipped. The record showed that the deposition was received and filed by the clerk of the court on the 22d of January, 1887, and was opened at the request of the attorney for plaintiff on the 5th of February of that year. This motion was as follows: "(1) Because said deposition is not certified to by the officer who took the same, as required by law regulating the taking of depositions *de bene esse*. (2) Because no reasonable notice of the time and place of taking said deposition was given the defendants, as required by law regulating the taking of depositions *de bene esse*. (3) Because said deposition was not taken under authority of any *dedimus potestatem* granted by any court of the United States according to common usage." The court overruled the motion to suppress the deposition, and it was admitted and read in evidence; to which ruling the defendants excepted.

Afterwards, on the same day, the plaintiff moved to strike out so much of the defendants' plea in reconvention as seeks to recover the sum of one dollar per barrel on twelve thousand barrels of flour — that part quoted above — which motion was sustained by the court, and the defendants excepted.

The plaintiff then introduced in evidence the contract sued on, and gave evidence tending to prove that the same had been complied with on its part. The defendants introduced

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evidence tending to prove that the mill contracted to be built by the plaintiff for the defendants was not completed within a reasonable time, and was defectively constructed, and that the defendants were delayed in the manufacture of flour by reason of such delay and such defective construction. The defendants then offered, in writing, to prove by their own individual testimony, "that the market price per barrel for flour of the grade the contract sued upon stipulated for, between the middle of July, 1885, and the middle of September, 1885, was $5.00 per barrel; that during that period there was a ready cash market value in Texas for said grade of flour at $5.00 to $5.50 per barrel, and that the defendants could have sold 200 barrels per day during said period at $5.00 per barrel, and that upon each barrel so sold they would have realized $1.00 per barrel profit; that defendants had purchased and held on storage during said period a sufficient quantity of good wheat to have manufactured 200 barrels per day during said sixty days; that the market price during said period of such wheat was 60 to 70c. per bushel, and that the expense of turning such wheat into flour during said period was 80c. per barrel, and that defendants had in their employ all necessary laborers and skilled workmen to manufacture said wheat into flour, and were fully equipped with fuel and water and everything necessary to convert said wheat into flour, save and except the parts and pieces of said mill which plaintiff contracted to furnish in the contract sued on;" all of which above testimony was offered in support of that portion of defendants' plea in reconvention which sought to recover the profits on 12,000 barrels of flour. The court overruled the offer to prove all those facts, except the fact of the amount of wheat which the defendants had on hand during that period, to which ruling the defendants excepted. The plaintiff, in rebuttal, introduced the deposition of Odell, before mentioned, and other evidence tending to prove that the contract was complied with on its part. and that the building was not completed by June 1, 1885.

The jury returned a verdict in which they found for the plaintiff, on the contract, in the sum of $12,332.82, including

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interest; and for the defendants in the sum of $875, as damages. Upon this verdict judgment was rendered in favor of the plaintiff and against the defendants for $11,457.82. A motion for a new trial having been overruled, the defendants sued out this writ.

Mr. William Hallett Phillips for plaintiffs in error.

Mr. John Johns for defendant in error.

Mr. Justice Lamar, after stating the case, delivered the opinion of the court.

The errors assigned are as follows: "(1) There was error in sustaining the exception to that part of defendants' plea which sought the recovery of profits, and in rejecting defendants' offer of evidence in support of the plea. (2) The court erred in overruling the defendants' motion to suppress the deposition of Odell."

We will consider these assignments in the reverse order in which they are stated. The points made against the deposition of Odell by counsel for plaintiffs in error are, that it was not taken under any provision of the Revised Statutes of the United States, and that section 914, Revised Statutes, relating to the adoption by the federal courts of the forms and modes of proceeding in civil causes in the state courts, has no application to the present inquiry. It will be observed that these points do not relate to the competency of the witness whose deposition was taken, or to the admissibility of the evidence given in it, but are based solely on objections as to the form of the commission and the manner of taking the deposition. The record shows that the cause was at issue May 20, 1886. The commission to take the deposition of the witness Odell was signed January 4, 1887. Notice of the issuing of the commission was served on the defendants, and they filed cross-interrogatories in the premises, at the same time making the following waiver: "We waive copy of interrogatories and consent that commission may issue upon the original, direct

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and cross-interrogatories. (Signed) Lindsley & McCormick, att'ys for defendants." As already stated, the deposition was filed in the case on the 22d of January, 1887, and opened, at the request of the attorney for the plaintiff, on the 5th of February, following. The motion to suppress the deposition was not made until the 8th of February, when the case came on for trial. In our opinion, the motion in this instance was too late. The counsel for defendants by waiving copy of the interrogatories, when notice of them was served upon them, and consenting to the issue of the commission, and practically uniting with plaintiff's counsel in executing it, by adding their own cross-interrogatories, and withholding the objections until after the trial had begun, must be considered as having waived such objections. It is the settled rule of this court that the failure of a party to note objections to depositions, of the kind in question, when they are taken, or to present them by a motion to suppress, or by some other notice before the trial is begun, will be held to be a waiver of the objections. Whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is not possible to retake the deposition. *Shutte* v. *Thompson*, 15 Wall. 151, 158 *et seq.; Mechanics' Bank of Alexandria* v. *Seton*, 1 Pet. 299, 307; *Winans* v. *New York and Erie Railroad*, 21 How. 88, 100; *York Company* v. *Central Railroad*, 3 Wall. 107, 113; *Doane* v. *Glenn*, 21 Wall. 33, 35; *Buddicum* v. *Kirk*, 3 Cranch, 293, 297; *Rich* v. *Lambert*, 12 How. 347, 354.

The remaining assignment of error, which relates to the striking out of so much of the defendants' plea as sought a recovery of profits, and the refusal of the court to allow any evidence to be introduced in support of it, needs no extended consideration. The question raised by it is, whether the anticipated profits of the defendants resulting from grinding wheat into flour and selling the same, had the mill been completed at the date specified in the contract, can be recovered by way of damages for delay in putting up the mill machinery.

The authorities both in the United States and England are

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agreed that, as a general rule, subject to certain well-established qualifications, the anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach; but in the application of this principle the same uniformity in the decisions does not exist. In some cases of almost exact analogy, in the facts, the adjudications of the courts in the different States are directly opposite. The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the non-fulfilment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms. Sedgwick on Damages, (7th ed.,) vol. 1, p. 108; *The Schooner Lively*, 1 Gallison, 315, 325, *per* Mr. Justice Story; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 Wheat. 546; *La Amistad de Rues*, 5 Wheat. 385; *Smith* v. *Condry*, 1 How. 28; *Parish* v. *United States*, 100 U. S. 500, 507; *Bulkley* v. *United States*, 19 Wall. 37. But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. *United States* v. *Behan*, 110 U. S. 338, 345, 346, 347; *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444, 454, 456; *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Howard*, 13 How. 307.

Cases illustrating various phases of this rule are numerous. One of the leading ones applicable to the case in question is

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Hadley v. *Baxendale*, decided in the Court of Exchequer at Hilary term, 1854, 9 Exch. 341, 354, 356. In that case the plaintiffs, who were the owners of a flour-mill, sent a broken iron shaft to the office of the defendants, who were common carriers, to be conveyed by them to a manufacturer of such machinery, the broken shaft to serve as a model or pattern for the new one. The clerk of the defendants in their office was told that the mill was stopped, that the shaft must be delivered immediately and that a special entry should be made, if necessary, to hasten its delivery. The delivery of the broken shaft to the manufacturer was delayed an unreasonable length of time, in consequence of which the plaintiff did not receive the new shaft for some days after the time it ought to have been received, and they were, therefore, unable to work their mill from want of the new shaft, thereby incurring a loss of profits. It was held, however, that such loss of profits could not be recovered as damages in an action against the defendants as common carriers. Baron Alderson, in delivering the opinion of the court, laid down the rule of law as follows: "Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. . . . It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably

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contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."

That case has been cited with approval and commented on by many of the courts of this country and by text-writers as well. The general principles of it, we believe, are recognized and enforced, in most, if not all, of the several States. A large number of the cases are referred to in Sedgwick on the Measure of Damages, vol. 1, 66–76, and 5 Encyclopædia of Law, pp. 13, 15, 32–4, and we shall attempt no extended review of them. We shall content ourselves with a reference to a few of the leading ones most nearly similar to the one before us.

Pennypacker v. *Jones*, 106 Penn. St. 237, 242, was very much like the present case. In that case the plaintiffs, who owned and operated a flour-mill in Philadelphia, entered into a contract with the defendants by certain of the terms of which the defendants were to place in their mill, within a specified time, machinery of a certain capacity, to make flour of a high grade. The machines when furnished were found not to make a high grade of flour, and to be incapable of producing the stipulated number of barrels per day. In an action for damages by the plaintiff for breach of the contract, it was held that the loss of possible profits, which might have been made if the mill had run properly, was not a proper subject of damages, for the reason that such damages were too remote and speculative. In delivering the opinion of the court, Mr. Justice Green used this language: "It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual or market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There

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the possible profit is the very object of the contract, and is necessarily in the contemplation of the parties. But when a machinist furnishes machinery to a mill owner it is no part of his engagement that a profitable business shall be carried on with the machinery furnished. Of course if it is defective he is responsible for the damage resulting directly from such defect; but that is a very different thing from the uncertain, remote and speculative profits which may or may not be made in the business to be done."

In *Callaway Mining and Manufacturing Co.* v. *Clark*, 32 Missouri, 305, which was an action for the seizure and detention of a steamboat by an attachment which was discharged, it was held that the measure of damages was only the actual damage sustained by the seizure, and that the jury could not be permitted to speculate as to what might or might not have been the earnings of the boat during the period of seizure.

Blanchard v. *Ely*, 21 Wend. 342, was an action for the price of a steamboat. The defence was that part of the machinery of the boat was unsound and imperfect, whereby considerable delay was caused; and that the loss of the probable profits that would have been made upon the trips that might have been run during the time the vessel was delayed on account of the imperfections in its construction, might be recouped in the action for the price of the boat. But the court held that such contingent profits could not be allowed. See also *Olmstead* v. *Burke*, 25 Illinois, 86; *Winne* v. *Kelley*, 34 Iowa, 339; *Howe Machine Co.* v. *Bryson*, 44 Iowa, 159; *Freeman* v. *Clute*, 3 Barb. 424; *Griffin* v. *Colver*, 16 N. Y. 489; *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205; *Brown* v. *Smith*, 12 Cush. 366; *Boyd* v. *Brown*, 17 Pick. 453; *Willingham* v. *Hooven*, 74 Georgia, 233; *Georgia Railroad* v. *Hayden*, 71 Georgia, 518; *Bridges* v. *Lanham*, 14 Nebraska, 369; *Houston & Texas Cent. Ry. Co.* v. *Hill*, 63 Texas, 381; *Smith* v. *Condry*, 1 How. 28.

The principles announced by the above cited authorities lead to the conclusion that the court did not err in striking out that part of the defendants' plea which sought to recover $12,000 as the profits expected to be derived from the sale of the flour

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which they would have manufactured, and in excluding the evidence offered in support of the claim therein set up. Tested by them, such losses were, in our opinion, rather remote and speculative than direct and immediate, resulting from the breach alleged. There was no stipulation in the contract that the defendants should make profits on flour from the wheat ground up by the machinery which the plaintiff contracted to furnish and erect in the mill. Nor were there any special circumstances attending the transaction from which an understanding between the parties could be inferred that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery, according to the terms of the contract.

We see no error in the judgment of the court below prejudicial to the plaintiffs in error, and it is

Affirmed.

BAYNE *v.* WIGGINS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 151. Argued January 20, 1891. — Decided March 2, 1891.

If, after an oral agreement for the sale of land, the purchaser executes a deed, describing the land by metes and bounds, but insufficiently acknowledged to pass title, and sends that deed to the vendor in a letter stating the terms of payment in cash and notes, and requesting payment accordingly; and the purchaser replies by letter, containing a draft of a similar deed with a sufficient acknowledgment, requesting that it be executed instead of the other, and promising, on receipt of it, to "forward money, notes and old deed;" the two letters, and the deed inclosed in the first letter, together constitute a sufficient memorandum in writing to take the contract out of the statute of frauds.

THE case is stated in the opinion.

Mr. M. F. Elliott for plaintiffs in error. *Mr. R. Brown* and *Mr. F. E. Watrous* were also on the brief.

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Mr. S. A. Davenport for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action of assumpsit by D. B. Wiggins and Jane M. Wiggins, his wife, citizens of New York, against S. G. Bayne, J. M. Fuller and T. J. Melvin, citizens of Pennsylvania.

The declaration alleged that on November 21, 1883, Mrs. Wiggins sold, and the defendants agreed to buy, a tract of land, owned by her, and situated in Lafayette township and McKean County in the State of Pennsylvania, for the price of $10,000, payable one-half on delivery of the deed, one fourth in three months and the other fourth in six months, with interest; and that on November 28, 1883, she delivered to them a good and sufficient deed of the land, and possession of the same.

The evidence introduced by the plaintiffs at the trial was to the following effect:

Wiggins and wife resided near Buffalo in New York; and she was seized of the land in question under a recorded deed.

On November 21, 1883, at Bradford in Pennsylvania, and in the office of the First National Bank of Bradford, of which Bayne was president and Fuller vice-president, Wiggins made an oral agreement with Bayne and Fuller to sell the land for the price of $10,000, half in cash (of which the sum of $250 was at once paid to him) and the other half in notes payable in three and six months, with interest; and the following memorandum of their agreement was drawn up by Bayne, signed by his direction by the cashier of the bank, and delivered to Wiggins:

"Bradford, Pa., November 21, 1883. Received $4750 from Bayne, Fuller and Melvin, which is the cash payment on a lot of 70 acres of land sold to them by D. B. Wiggins for $10,000; the balance to be paid in notes and money, as agreed on by both parties. I am to remit this money and the notes spoken of to said D. B. Wiggins on his forwarding a good deed of said land. The notes are to be $2500 at three months

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and $2500 at 6 months, both with interest. W. W. Bell, Cashier."

Melvin was not present at that time, but afterwards admitted, in conversation with Wiggins and another person, that Bayne, Fuller and himself were the purchasers; and Bell acted as their agent, and one Hayes at Buffalo as the plaintiffs' agent, throughout the subsequent transactions.

On November 23, Wiggins and wife executed at Buffalo a deed to Bayne, Fuller and Melvin, dated November 22, of the land, describing it fully by metes and bounds, and expressed to be in consideration of the payment of $10,000; and acknowledged it before a notary public. But that deed was insufficient, under the law of Pennsylvania, to pass the title, because the notary's certificate did not state that he had made known its contents to the wife. Penn. Stat. February 24, 1770, §§ 2, 3; 1 Dall. Laws, 536, 537; 1 Purdon's Digest (11th ed.) 568, 569; *Watson* v. *Mercer*, 6 Sergeant & Rawle, 49; *Hornbeck* v. *Mutual Building & Loan Association*, 88 Penn. St. 64; *Enterprise Transit Company* v. *Sheedy*, 103 Penn. St. 492.

On the same day, Hayes sent that deed to Bell in a letter, saying: "I enclose for collection and remittance deed of J. M. and D. B. Wiggins, for which please remit us your draft on New York, $4750, and two notes given by Bayne, Fuller and Melvin, $2500 each, at 3 and 6 months, with interest, to order D. B. Wiggins."

On Saturday, November 24, Bell replied to Hayes: "Yours of 23d inst. is at hand. The search is taking longer than expected, but will probably be completed by Monday."

On Tuesday, November 27, Bell wrote to Hayes, inclosing an unsigned deed, substantially similar to the first one, except that the certificate of acknowledgment was according to the law of Pennsylvania; and saying in his letter: "I enclose a deed that Bayne, Fuller and Melvin's attorney wishes executed in place of the one sent by you, on receipt of which I will forward money, notes and old deed. This is a Pennsylvania form, and the other is a New York one."

On November 28, Wiggins and wife signed this deed, and

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he sent it through Hayes to Bell; and it came back on November 29, together with the first deed, and a letter from Bell to Hayes, which was given in evidence, dated November 29, in which Bell said: "By request of Bayne, Fuller and Melvin I return deed of D. B. Wiggins to you. Their attorney has written Mr. Wiggins giving the reason for so doing."

There was also given in evidence a letter, dated November 27, and postmarked Bradford, November 29, to Wiggins from the defendants' attorney, saying: "Bayne, Fuller and Melvin decline absolutely to purchase the 80 acres of land in Lafayette, this county, and ask you at once [to] refund the money paid and return receipt given. They have been put in possession of the facts in detail as to the means used by yourself in collusion with others to try and induce them to make the purchase. In addition to this the title to the land is not good, and they decline to accept the deed offered and have directed the same to be returned. Prompt action on your part is demanded. If you do not at once return the money and receipt, I have advised them to promptly take such action as the facts now in their possession certainly justify."

On November 30, Wiggins went to Bradford, saw Bayne and Fuller, tendered them the second deed, and demanded the money and notes, in accordance with the original contract, and they refused to give them or to accept the deed.

The defendants relied on the provisions of the statute of frauds of Pennsylvania, copied in the margin;[1] and requested

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[1] By the statute of Pennsylvania of March 21, 1772, "All leases, estates, interests of freehold or term of years, or any uncertain interest, of, in or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the making thereof. And moreover, no leases, estates or interests either of freehold or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or

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the court to instruct the jury that "the contract for the sale of the premises described in the plaintiffs' declaration being in parol, and there being no evidence that any possession thereof was taken by the defendants under and pursuant to the contract, there can be no recovery of the purchase price by the vendor, unless the contract was fully executed by the delivery of a good and indefeasible deed for the land accepted by the vendees."

The court instructed the jury accordingly, but with this qualification, that if the first deed, the one of November 22, 1883, was accepted by the defendants, and at their request the plaintiffs executed and on November 28, 1883, transmitted to Bell a second deed, and on November 30, 1883, such second deed was tendered by the plaintiffs to two of the defendants, namely, Bayne and Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective.

The jury returned a verdict for the plaintiffs in the sum of $11,300, upon which judgment was rendered; and the defendants, having duly excepted to the instructions, sued out this writ of error.

It may be admitted that the original memorandum of November 21, signed by Bell in the presence and by the authority or assent of both parties, which stated a sale by Wiggins to the defendants of "a lot of seventy acres of land," and specified the terms of payment in cash and notes, was not of itself a sufficient memorandum to satisfy the statute of frauds, because it in no way described or gave any means of identifying the land sold.

The deed to the defendants, executed by the plaintiffs on November 23, was not acknowledged so as to take effect as a conveyance, nor accepted as such by the defendants. But it contained a full description of the land by metes and bounds; and it was sent to the defendants' agent by the plaintiffs'

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hereditaments, shall at any time be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereto lawfully authorized by writing, or by act and operation of law." 1 Dall. Laws, 640; 1 Purdon's Digest (11th ed.) 830, 831.

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agent in a letter demanding payment of part of the price in money, and of the rest in notes, in the terms of the original memorandum. The defendants' agent replied on the next day that he had received that letter; and three days later, in further response, wrote another letter, inclosing a form of deed substantially like the first one, but with a sufficient certificate of acknowledgment, requesting that this deed might be executed instead of the other, and promising, on receipt of it, to "forward money, notes and old deed."

This letter of the defendants' agent, read in connection with the other writings which had passed between the parties, unequivocally refers to the first deed, which fully described the land sold, and to the money and notes to be given in payment therefor, as specified in the letter which inclosed that deed. In the light of the undisputed facts, its language could apply to nothing else. It thus, by necessary reference, embodies a definite statement of the contract actually made by the parties, both as to the property to be conveyed, and as to the terms of payment; and, taken together with that deed and that letter, constitutes a sufficient memorandum, signed by both parties or their agents, to take the case out of the statute of frauds. *Beckwith* v. *Talbot*, 95 U. S. 289; *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; *McFarson's Appeal*, 11 Penn. St. 503, 510; *Tripp* v. *Bishop*, 56 Penn. St. 424.

For this reason, the defendants cannot have been prejudiced by the instructions given to the jury; and it becomes unnecessary to consider whether, under the statute of frauds of Pennsylvania, as expounded by the Supreme Court of that State, the memorandum of a contract for the sale of land need be signed by the buyer, as well as by the seller, in order to maintain such an action as this. See Browne on Statute of Frauds (4th ed.) § 226, and cases there cited.

Judgment affirmed.

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NORTHWESTERN FUEL COMPANY *v.* BROCK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 1159. Submitted March 2, 1891. — Decided March 16, 1891.

The judgment in this case was reversed in this court for want of jurisdiction in the Circuit Court, 130 U. S. 341. The reversal was accompanied by an order that the defendants recover their costs in this court, and have execution therefor, and the cause was remanded to the Circuit Court for further proceedings. Upon filing the mandate in the Circuit Court, the defendants moved that they have judgment against the plaintiff for their costs in this court, and for the costs of the transcript from the Circuit Court, and that execution issue therefor. The defendants, alleging in their motion that certain sums had been collected on the judgment, also moved for a summary inquiry as to the amount, and that they have judgment for the same, with interest; and they having proved that there was collected by the plaintiff upon the judgment, by supplementary proceedings in aid of the execution thereon, the sum of $629.23, the court rendered judgment that the defendants recover that sum with interest and costs, and that the action be dismissed for want of jurisdiction as to the subject matter of the suit. *Held*, That the Circuit Court had jurisdiction to correct by its own order that which, according to the judgment of this court, it had no authority to do in the first instance, and that the judgment should be affirmed.

THE case, as stated by the court, was as follows:

The Northwestern Fuel Company, a corporation of Minnesota, brought an action in the Circuit Court of the United States for the Northern District of Iowa, against the defendants, citizens of that State, to recover the sum of $1309.50, claimed upon a contract made in July, 1881, between them and the What Cheer Land and Coal Company, alleged to be doing business in that State, and by that company assigned to the plaintiff. Judgment was recovered upon it for $1402.47, and the defendants brought the case on a writ of error to this court, where it was reversed upon the ground that the record did not show affirmatively that an action could have been brought upon it in the federal court if no assignment had been

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made; the act of 1875 declaring that no Circuit or District Court should "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." 18 Stat. 470; *Brock* v. *Northwestern Fuel Co.*, 130 U. S. 341.

The reversal was accompanied by an order that the defendants recover their costs in this court, and have execution therefor, and the cause wa' remanded to the Circuit Court for further proceedings.

Upon filing the mandate in the Circuit Court, the defendants moved that they have judgment against the plaintiff for their costs in this court, and for the costs of the transcript from the Circuit Court, and that execution issue therefor. The defendants, alleging in their motion that certain sums had been collected on the judgment, also moved for a summary inquiry as to the amount, and that they have judgment for the same, with interest; and further, that the suit be dismissed with costs, unless the plaintiff should forthwith, by amendment, show a cause of action of which the court had jurisdiction. The court ordered that the defendants have execution against the plaintiff for the costs mentioned; and afterwards gave the plaintiff leave on or before September 1, 1889, to file amendments to the petition as to the jurisdiction of the court. It also gave judgment for the amount paid for the transcript of the record for this court.

The plaintiff failed to amend its petition, within the time designated, showing jurisdiction in the court, and the defendants moved that the action be dismissed; and they having proved that there was collected by the plaintiff upon the judgment, by supplementary proceedings in aid of the execution thereon, the sum of $639.23, the court rendered judgment as follows:

"Now, this 4th day of December, A.D. 1889, this cause again coming before the court, upon the motion by defendants for a judgment in restitution for money collected by the plaintiff on the original judgment herein, which original judgment was

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reversed by the Supreme Court, as it appears from its mandate as filed herein, and plaintiff appearing by Messrs. Henderson, Hurd, Daniels & Kiesel, its attorneys, and the defendants appearing by Charles A. Clark, their attorney, and the plaintiff having failed to amend its pleadings so as to show jurisdiction of this court as to the subject matter of the action, and the court finding that the plaintiff has collected from the defendants on the original judgment herein in favor of plaintiff and against defendants the sum of six hundred twenty-nine and 23-100 dollars on the first day of May, 1884, which said sum, with interest thereon at six per centum per annum from said date, the defendants are entitled to recover back from plaintiff, because said original judgment herein has been and is reversed and set aside:

"It is therefore ordered and adjudged by the court, that the defendants, R. G. Brock and T. G. McKenzie, do have and recover of and from the plaintiff, the Northwestern Fuel Company, the sum of eight hundred and forty dollars, ($840,) with interest thereon at six per cent per annum until paid, together with the costs of this action, taxed at $22.70, with judgment for said costs against C. W. Eaton, surety on the cost bond filed herein, and that said plaintiff pay said sums into this court within twenty (20) days, in default of which payment defendants shall have execution therefor. To all of which the plaintiff at the time excepted.

"And it is further ordered that this action be now dismissed for want of jurisdiction as to the subject matter of this suit."

To reverse this judgment the case is brought to this court on writ of error, under the act of Congress of February 25, 1889. 25 Stat. 236, p. 693.

Mr. David B. Henderson and *Mr. Francis B. Daniels* for plaintiff in error.

Mr. Charles A. Clark for defendants in error.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

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The alleged error of the court below is, that it had no jurisdiction to render judgment for restitution of the money collected on the reversed judgment. This is put forth in different forms, but in no way variant in substance. The gist of the whole complaint is that the reversal by this court being for want of jurisdiction in the Circuit Court — such jurisdiction not affirmatively appearing — that court had no authority to act further in the matter than as directed by the mandate; and that that went only to the reversal of its judgment and the collection of the costs incurred in the appellate court.

This position is supposed to be supported by those decisions which hold that when a case is dismissed for want of jurisdiction in the Circuit Court to entertain the action, or render the judgment entered, the power of that court to award costs is gone. *Mayor* v. *Cooper*, 6 Wall. 247, 250; *Hornthall* v. *The Collector*, 9 Wall. 560, 566; *Mansfield Railroad Co.* v. *Swan*, 111 U. S. 379, 387.

But here the jurisdiction exercised by the court below was only to correct by its own order, that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal.

The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution. Thus in *Anonymous*, 2 Salkeld, 588, it was held by Holt, C. J., that "where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party shall have restitution with-

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out a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias* suggesting the matter of fact, viz. the sum levied, etc."

The same doctrine has been fully recognized by this court in *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 17. In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said: "On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost; and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salk. 587–8; Tidd's Pract. 936, 1137–8. And, no doubt, circumstances may exist where an action may be sustained to recover back the money." We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties, the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction.

In the case of *Morris' Cotton*, 8 Wall. 507, property on land was seized under the acts of 1861 and 1862, passed for suppression of the rebellion, according to which the claimants were entitled to a trial by jury. Such trial was not allowed, but a decree forfeiting the property was passed by the court below. This was reversed by this court, which held that the District Court had no jurisdiction to proceed in the case in the manner in which it did; and, although the proceeds of the

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sale of the property had been distributed, it directed, in its decree of reversal, that the court below should grant a new trial and issue a writ for restitution of the proceeds to the registry of the court.

In *Ex parte Morris*, 9 Wall. 605, 607, the United States filed an information in the District Court for the Middle District of Alabama, against certain bales of cotton, which it was alleged were liable to seizure and confiscation, and had come into the possession of the petitioners. The court entered a personal decree against them for the value of the cotton. On appeal this court reversed the judgment and remanded the cause to the District Court with directions "to cause restitution to be made to the appellants of whatever they have been compelled to pay under that decree."

The same doctrine is sustained in the several state courts of the country, all recognizing the power of a court, whose judgment is set aside on its own motion or reversed by order of an appellate tribunal, to direct restitution, so far as practicable, of all property and rights which have been lost by the erroneous judgment. *Hiler* v. *Hiler*, 35 Ohio St. 645, 646; *Chamberlain* v. *Choles*, 35 N. Y. 477, 479.

Judgment affirmed.

BREWER, J. (BROWN, J., concurring):

I had supposed the law to be otherwise, and that if the Circuit Court did not have jurisdiction by reason of a lack of proper citizenship of the parties to render a judgment in favor of the plaintiff against the defendant, it was equally without jurisdiction thereafter in the same case and without any change in the citizenship to render a judgment in favor of the defendant against the plaintiff. But the result is so manifestly equitable I am glad to know that I was mistaken, and that the law is as it is now adjudged to be.

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BRITISH QUEEN MINING COMPANY *v.* BAKER SILVER MINING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 169. Argued March 13, 1891.—Decided March 16, 1891.

There being no exceptions to the rulings of the court in the progress of the trial, and the findings of fact by the court being general, the record raises no question open to revision.

THE case is stated in the opinion. Argument was begun on behalf of the plaintiff in error, but the court, on examining the record, declined to hear further argument.

Mr. James B. Reilly for plaintiff in error.

Mr. A. H. Wintersteen and *Mr. Wayne McVeagh* filed a brief for defendant in error. *Mr. E. T. Wells*, *Mr. R. T. McNeal* and *Mr. John G. Taylor* also filed a brief for same.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This case was tried by the Circuit Court, without a jury, and under §§ 649 and 700, Rev. Stat., the finding must be "either general or special." It cannot be both. Here there was a general finding.

The record contains a bill of exceptions, but no exceptions to the rulings of the court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that "the court thereafter and during the said term made the following findings of fact and judgment thereon," which is followed by an opinion of the court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded. *Dickinson* v. *Planters' Bank*, 16 Wall. 250; *Ins. Co.* v. *Folsom*, 18 Wall. 237; *Norris* v. *Jackson*, 9

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Wall. 125; *Flanders* v. *Tweed*, 9 Wall. 425; *Ins. Co.* v. *Tweed*, 7 Wall. 44; *Miller* v. *Life Ins. Co.*, 12 Wall. 285; *Ins. Co.* v. *Sea*, 21 Wall. 158; *Martinton* v. *Fairbanks*, 112 U. S. 670; *Raimond* v. *Terrebonne Parish*, 132 U. S. 192; *Glenn* v. *Fant*, 134 U. S. 398; *Lloyd* v. *Mc Williams*, 137 U. S. 576.

The record raises no questions open to revision by us and the judgment is *Affirmed.*

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY *v.* COMMERCIAL UNION INSURANCE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 1169. Submitted December 15, 1890.—Decided March 16, 1891.

In the State of Arkansas, foreign insurance companies are governed by the statute of March 26, 1887, requiring such companies to file with the auditor of State stipulations for the service of process upon them, and not by the statute of April 4, 1887, which requires foreign corporations to file such stipulations with the Secretary of State.

The right of an insurer, upon paying for a total loss of the goods insured, to recover over against a third person responsible for the loss, is derived by way of subrogation from the assured, and can be enforced in his right only.

A railroad corporation, which has contracted with a compress company to receive and transport all cotton brought by its owners to the warehouse of that company, and neglects to do so, by reason of which, and of the consequent accumulation of cotton at the warehouse, so large a mass of cotton is piled and kept by the compress company in the adjoining street, as from the danger of taking fire to become a public nuisance, and is there destroyed by fire from an unknown cause, is not responsible for the loss to owners of part of such cotton for which it has given no bills of lading, if it has in fact assumed no custody or control of any of the cotton, or of the place where it was kept, before it was put upon the cars; although it has, as a matter of convenience, given to the owners of other parts of such cotton bills of lading in exchange for the warehouse receipts of the compress company; and although it is prohibited by statute, under a penalty, from issuing bills of lading, except for goods actually received into its possession.

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Statement of the Case.

THIS was an action at law, brought September 21, 1889, against a railroad corporation of Arkansas, by three insurance companies, corporations of other States or of England, to recover the sum of $17,000, which the plaintiffs had insured on 340 bales of cotton to Samuel O. Smith & Co., the owners thereof, and had paid to them upon a loss of the cotton by fire, in consequence (as the complaint alleged) of the defendant's negligence.

A plea of nonjoinder of Samuel O. Smith & Co. was filed and overruled, and the defendant answered to the merits.

The evidence introduced by the plaintiffs at the trial tended to prove the following facts:

Before September 20, 1887, the defendant (whose railway extended from Little Rock in Arkansas across the Arkansas River to Argenta and beyond) had made an oral contract with the Union Compress Company (which was engaged in compressing bales of cotton for transportation) to receive all cotton in bales that might be brought by its owners to the sheds of the compress company at the foot of Main Street in Little Rock, and to transport it over its railway across the Arkansas River to the compress of that company in Argenta, a distance of a mile and a half, for $2 a carload. Immediately in front of the sheds was a platform along the railway track, and habitually used by the compress company for the purpose of loading cotton on the cars.

While the contract was in force, 340 bales of uncompressed cotton were placed by Samuel O. Smith & Co. at the sheds and in the care and custody of the compress company, which gave them a receipt stating that the cotton was "received by the Union Compress Company for compression; storage after ten days will be charged; not responsible for any loss by fire;" and afterwards, by reason of an accumulation of cotton in the sheds, owing to the neglect of the defendant railway company, though often requested by the compress company, to furnish transportation according to the contract between them, the compress company piled and kept these bales and much more other cotton in the street adjoining.

The defendant railway company, as a matter of convenience

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to all parties, and at the request of owners of cotton, often gave them, in exchange for the receipts of the compress company, and before the cotton was put on the cars by the latter, through bills of lading to its ultimate destination after being compressed; and, after so issuing such bills of lading, gave written notice to the compress company, stating the fact of their issue, and directing the compress company to ship the cotton on the railway by a certain route and to a certain address; and the compress company, on receiving such notice, insured the cotton in behalf of the railway company, and put the cotton on the cars, compressing it at Argenta for the convenience of further transportation.

The railway company gave such bills of lading for most of the other cotton; but it gave no bill of lading for the 340 bales in question; and, unless through its dealings with the compress company as aforesaid, it in fact exercised no custody or control of the sheds and the street, or of any of the cotton, before it was put on the cars by the compress company.

The plaintiffs, on October 17 and 19 and November 11, 1887, by their agents at Little Rock, without having complied with the provisions of the statute of Arkansas of April 4, 1887, c. 135, entitled "An act to prescribe the conditions upon which foreign corporations may do business in this State," severally issued policies of insurance to Smith & Co., amounting in all to $17,000, on the 340 bales of cotton, describing it as in the sheds, on the platform and in the street. The value of these bales was $18,179.

On November 14, 1887, the cotton piled in the street, including the 340 bales, was wholly destroyed by fire from an unknown cause; and the plaintiffs afterwards paid Smith & Co. the sums insured.

The defendant requested the court to give, among others, the following instructions to the jury:

"5th. If at the time said cotton was burned, on November 14, 1887, at the foot of Main Street, it was in the custody, possession and control of the Union Compress Company, and upon premises over which the defendant railway company had no control, and if it owed no duty as a common carrier in

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relation to said cotton, and if, while in such custody and control, the cotton was set on fire by the act of some unknown person, with whom the defendant had no connection and of whom it had no knowledge, then the defendant railroad company cannot be held liable in this action."

"11th. If the jury find from the evidence that there was no contract or arrangement between the railway company and the compress company which contemplated the depositing of cotton in and upon Main Street, but that the placing of cotton there and the permitting of it to be placed there was the sole act of the compress company and the owners of the cotton, and that the railway company had no control over the premises where the cotton was stored, then the defendant is not liable in this suit, even though the depositing of cotton in and upon Main Street constituted a public nuisance.

"12th. In order to make the defendant liable for the placing of cotton in and upon Main Street, the jury must find from the evidence that the defendant was a party to the arrangement or agreement by which the cotton was deposited in and upon said street; and the mere fact that an arrangement existed by which the defendant issued bills of lading for cotton deposited in the compress warehouses and had agreed to handle the same from said warehouses to Argenta, this fact of itself will not make the defendant liable for an injury which would not have happened except for the placing of cotton on the street itself."

"14th. If the jury find that the plaintiffs, at the time of the issue of the policies of insurance introduced in evidence in this cause, had not and have never up to this date filed in the office of the Secretary of State certificates designating an agent upon whom service of summons and other process may be made, or certificates stating the principal place of business of each plaintiff in this State, as required by the statute of the State, it cannot maintain this action."

The court refused to give each of these instructions; and instructed the jury that, by the agreement between the defendant and the compress company, the defendant made the cotton sheds of that company a receiving station for cotton to

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be sent by any one from Little Rock to the compress of that company at Argenta, and "it was the duty of said defendant to transport the cotton, thus received at said cotton sheds for shipment, promptly to Argenta; and that if the defendant failed to do so, and by reason of the continued reception of cotton at said sheds, and the continued giving of bills of lading therefor as often as demanded by shippers thereof, down to the day of the fire, cotton was suffered to accumulate at said sheds and on Main Street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then the defendant was guilty of aiding in the creation and maintenance of a public nuisance, and is liable for the loss mentioned in the complaint;" and that if the jury found that "the defendant was guilty of aiding in erecting, maintaining or continuing said nuisance as aforesaid, and the cotton mentioned in said complaint was destroyed by reason thereof," and was at the time of the loss insured against fire by the plaintiffs, and the plaintiffs since that time and before bringing this suit paid the amount of the loss to the assured, the jury should return a verdict for the plaintiffs for the sums so paid, with interest.

The grounds of the rulings and instructions of the Circuit Court appear in its opinion delivered in a similar action brought against the same railway company by another insurance company, and reported as *Marine Ins. Co.* v. *St. Louis, Iron Mountain & Southern Railway*, 41 Fed. Rep. 643.

The defendant duly excepted to the refusal to give each of the instructions requested, and to so much of the instructions given as is above stated; and, after verdict and judgment for the plaintiffs, sued out this writ of error.

Mr. John F. Dillon and *Mr. Harry Hubbard* for plaintiff in error.

Mr. U. M. Rose, *Mr. E. W. Kimball*, and *Mr. G. B. Rose* for defendants in error.

I. The first assignment of error on the part of the appellant is to the effect that suit should have been brought in the

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name of the insured. As to this point it is enough to say that it was never made in the court below; but, if Smith, the insured, was a necessary party, as contended for by counsel, nevertheless the omission to have him made a party under the circumstances appearing in the record in this case, is not a reversible error.

The Arkansas Civil Code provides as follows: "The court must in every stage of an action disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Mansfield's Digest, sec. 5083; *Sannoner* v. *Jacobson*, 47 Arkansas, 31, 44.

The plain meaning of the statute is that the statutory rules of procedure — and there are no others — are directory only; mere means for the attainment of justice, and in no sense objects to which justice shall be sacrificed. *Washington* v. *Love*, 34 Arkansas, 93.

II. As to the claim that the plaintiffs could not maintain the suit because they were foreign insurance companies doing business in Arkansas. Counsel for plaintiff in error copy in their brief the statute of 1887, relating to foreign corporations. But, prior to that time, a counterpart of that act, specially applying to insurance companies, had been passed. By reference to Mansfield's Digest, §§ 3827, 3831, 3834, which codify the provisions contained in that statute, it will be seen that these sections are a part of a series of statutes relating to insurance companies, forming a code in itself, establishing an "insurance bureau," and governing matters of insurance generally. The sections above quoted had the same effect as to insurance companies that the later act had upon other foreign corporations. They differ in respect of the particular that in the case of foreign insurance companies the stipulation should be filed in the office of the Auditor, while in the case of other foreign corporations it was to be filed in the office of the Secretary of State.

III. As to the negligence of the defendant. The evidence, without conflict, showed that the defendant had the only line

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of railway running from the foot of Main Street to the compress in Argenta; that it made a contract with the compress company to transport all cotton received to the compress in Argenta at the price of $2 per load; that the defendant was to send the cars as they were needed; that it was called on by the compress company to furnish cars to remove the arriving cotton; that it failed to do so; that cotton lay at the foot of Main Street, much of it under bills of lading, during very dry weather, for from seven to twenty days, when the fire took place, burning from 3500 to 4000 bales in and around the sheds of the compress company and in the street, of which cotton bills of lading had been given by the defendant for more than 1400 bales.

Counsel insist that the station of the railway company at the foot of Main Street was not a receiving station, but no reason for arriving at such a conclusion is suggested. It was a place where every one took his cotton for shipment if he wished to do so. As virtually all cotton is compressed in the present day before shipment to market, the incidental compression of cotton on the way, did not in any manner affect the fact that the station was not only a station of the defendant, but a general station.

The number of bales that were received there within a short period, shows that it was not only a receiving station, but that it was a receiving station for a very large amount of cotton.

This was then practically the only shipping station for cotton in the city that defendant had at that time. It had agreed with the compress company that it would ship all cotton that should be received there to the compress in Argenta. The contract was in full force and unrescinded up to the time that the fire occurred. This was simply a shipping contract, made by a common carrier in the ordinary course of business. The fact that the compress company expected to compress the cotton after it was delivered in Argenta, cuts no figure in the case.

It is true that the compress company, acting as agent of defendant, did not issue bills of lading for cotton thus transported; but that was because bills were issued by another agent to the owners for the transit from Little Rock to Ar-

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genta, and beyond; and as between the compress company and defendant the standing agreement was the equivalent of a bill of lading. Moreover, the compress company was paid for performing what service it did perform for the defendant in and about the transportation of the cotton. It was to load the cars for the defendant. Necessarily it could not load the cotton without receiving it. As the contract covered the entire operation of receiving, loading and transportation, the consideration agreed on must be regarded as having relation to every part of the service performed and received. The cotton would not have accumulated if the defendant had performed its duty, and hence it is liable. *Little Rock Railroad Co.* v. *Dick*, 52 Arkansas, 402; *Jones* v. *Norris*, 46 Arkansas, 207; *Denver & South Park Railroad Co.* v. *Conway*, 8 Colorado, 1; *Scott* v. *Hunter*, 46 Penn. St. 192; *S. C.* 84 Am. Dec. 542.

The creator of a nuisance, or one who more remotely, either by negligence or design, furnishes means and facilities for the commission of any injury to another, which could not have been done without them, is equally responsible with the wrongdoer. *Anderson* v. *Dickie*, 26 How. Pr. 105. See also *Rogers* v. *Stewart*, 5 Vermont, 215; *S. C.* 26 Am. Dec. 296; *Scott* v. *Hunter*, 46 Penn. St. 192; *S. C.* 84 Am. Dec. 542; *Lake* v. *Milliken*, 62 Maine, 240; *Barrett* v. *Third Avenue Railroad Co.*, 45 N. Y. 628; *Slater* v. *Mersereau*, 64 N. Y. 138; *Davenport* v. *Ruckman*, 37 N. Y. 568; *Wasmer* v. *Delaware & Lackawanna Railroad Co.*, 80 N. Y. 212; *Linnehan* v. *Rollins*, 137 Mass. 123; *Ingwersen* v. *Rankin*, 47 N. J. Law (18 Vroom), 18; *King* v. *Pedly*, 1 Ad. & El. 822; *Henry* v. *Dennis*, 93 Indiana, 452; *Bonnell* v. *Smith*, 53 Iowa, 281; *Myers* v. *Malcom*, 6 Hill, 292; *S. C.* 41 Am. Dec. 744; *Salisbury* v. *Herchenroder*, 106 Mass. 458.

Ordinarily the cases on this subject present the feature of negligence on the part of the agent unknown and unsanctioned by the principal. In such cases the principal and the third person injured are, morally speaking, equally innocent, and the law fixes liability on the former because he had the selection of the agent. Such is not the case here. As for the fault of not removing the cotton promptly from its dangerous

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locality, the defendant was solely to blame. As to the manner in which the cotton was kept while it was waiting for transportation, the want of protection against the ever-impending danger of fire, its continuous and reckless exposure, the defendant was as guilty as its agent. Being a corporation it could only act through agents, and it was as much bound for what was done by the compress company within the scope of its authority as it was for what was done by its conductors, train dispatchers and engine drivers within the scope of theirs.

If it were assumed that it was negligence in the compress company to let the cotton accumulate as it did, and to cause it to be piled in a public street, the result was confessedly, and by all the authorities, a nuisance "of a very alarming character." What, then, was the duty of the compress company, supposing it to have suddenly become aware of the danger that had been incurred by its improper conduct? Clearly there could not have been any building erected on the spot within a reasonable time for the safe storage of the cotton. The only practical remedy, easy, prompt and inexpensive, was to remove it from a place where it was exposed constantly to dangers seen and unseen.

Now the compress company had a standing contract with the defendant to do this very thing. Supposing that the owners of the cotton had sued that company for the loss of their cotton, no possible doubt can exist, according to law and the theory of the defence in this case, but that the latter would have been held liable. In the present case, the plaintiffs are entitled to the same right of action against the defendant that the compress company would have had in the case mentioned. Concerning this proposition, no shadow of doubt exists, as a brief glance at the authorities will show. *Water Co.* v. *Ware*, 16 Wall. 566, 575; *Milford* v. *Holbrook*, 9 Allen, 17; *S. C.* 85 Am. Dec. 735; *Bean* v. *Green*, 4 Cush. 279; *Woburn* v. *Boston & Lowell Railroad*, 109 Mass. 283.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

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At the very foundation of this action lies the objection of the defendant that the plaintiffs could not acquire or enforce any rights under or by virtue of the contracts of insurance made by them within the State of Arkansas, because they had not complied with the statute of Arkansas of April 4, 1887, c. 135, entitled "An act to prescribe the conditions upon which foreign corporations may do business in this State," and containing the following provisions:

"SEC. 1. Before any foreign corporation shall begin to carry on business in this State, it shall, by its certificate under the hand of the president and seal of such company, filed in the office of the Secretary of State, designate an agent who shall be a citizen of this State, upon whom service, summons and other process may be made. Such certificate shall also state the principal place of business of such corporations in this State. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this State.

"SEC. 2. If any such foreign corporation shall fail to comply with the provisions of the foregoing section, all its contracts with citizens of this State shall be void as to the corporation, and no court of this State shall enforce the same in favor of the corporation."

But a comparison of that statute with other legislation of the State of Arkansas clearly shows that it was not intended to include foreign insurance companies.

That statute was the earliest one of the kind in Arkansas, concerning foreign corporations generally. But a counterpart of that statute, (embodied in Mansfield's Digest, c. 83,) concerning foreign insurance companies, had for years been in force, which, after establishing an "insurance bureau" in the office of the auditor of state, and making it the duty of the auditor to see that all the laws of the State respecting insurance companies were faithfully executed; declaring it to be unlawful for any person, company or corporation to solicit or make any contract of insurance within the State without complying with the provisions of this act; and requiring every insurance company or association, domestic or foreign, doing

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business in the State, to transmit to the auditor, annually, or oftener if requested, statements of its condition, business and receipts; provided as follows:

"SEC. 3831. No person shall act as agent or solicitor in this State of any insurance company of another State or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association by the auditor a certificate of authority, showing that the company or association is authorized to transact business in this State."

"SEC. 3834. No insurance company not of this State, nor its agents, shall do business in this State, until it has filed with the auditor of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this State."

This statute also provided, by §§ 3832, 3833, that such companies should report to the auditor annually the amount of premiums received within the State, and certify to the auditor the names of "the agents appointed by them to solicit risks, issue policies or receive applications in this State," and that no such agent should transact business until he had procured a certificate from the auditor; and, by § 3835, that any foreign insurance company, or any person or corporation transacting business for it, without being authorized under this act, should be fined $500 a month, and be prohibited from doing business in the State until the fines were paid.

On March 26, 1887, only nine days before the passage of the statute concerning foreign corporations on which the defendant relies, the same legislature passed an act "for the better regulation of the business of insurance in this State," (Stat. 1887, c. 84,) containing the following provisions:

"SEC. 3. Before any corporation or company organized under the laws of any other State shall be permitted to do business in this State, they shall, in addition to filing the bond required

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in section one of this act, be required to file with the auditor of state a statement of the commissioner of insurance of the State under whose laws they are organized, as to their condition, responsibility, etc., and if there be no such commissioner, the auditor may require said company to exhibit to him a statement of their financial condition, responsibility, etc., and if it appears that said company is a responsible company, said auditor shall issue a certificate to them, as hereinafter provided.

"SEC. 4. When any insurance company shall have complied with all the provisions of this act, it shall be the duty of the auditor of state to issue to said company a certificate to that effect, which shall entitle them to do business in this State; and if any person shall attempt to solicit or transact any business for and in the name of any such company, which company has not complied in all respects with the requirements of this act, he shall be guilty of a misdemeanor," and be fined not exceeding $500.

It thus appears that the State of Arkansas had established and maintained a distinct system with regard to foreign insurance companies, under the superintendence of the state auditor, by which every such company was required to file with the auditor a stipulation for the service of process upon it, as well as to make full returns of its condition and business to that officer, to report to him the names of all its agents within the State, and to receive from him certificates of authority for itself and for each of its agents; evidently contemplating that a foreign insurance company would have no principal place of business within the State, but would transact its business in the usual manner through agents at different places.

Such being the settled policy of the State with regard to foreign insurance companies, they cannot reasonably be held to be governed by the act concerning foreign corporations generally, which required a certificate to be filed with the Secretary of State, designating an agent upon whom service might be made, and stating the principal place of business of the corporation within the State. To construe that act as including foreign insurance companies would require the drawing of one of two equally improbable inferences; either that

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the only stipulations of such companies for service of process upon them should be filed in a different public office from that in which all other returns and documents relating to such corporations are preserved; or else that their stipulations for such service must be filed both with the auditor and with the Secretary of State.

For these reasons, we are satisfied that the omission of the plaintiffs to file in the office of the Secretary of State the certificates required by the statute of Arkansas of April 4, 1887, c. 135, was no bar to this action; and that the fourteenth instruction requested was rightly refused.

It is not contended that the plaintiffs' contracts were void for want of compliance with the provisions of the statutes of Arkansas concerning foreign insurance companies, and it does not even appear whether they had or had not complied with them.

The validity of the contracts of insurance being established, there can be no doubt of the nature and extent of the rights acquired by the plaintiffs under those contracts.

In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action, none passes to the insurer. *Hall* v. *Railroad Cos.*, 13 Wall. 367, 370, 372; *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584, 593; *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 321; *Liverpool & Great Western Co.* v. *Phenix Ins. Co.*, 129.

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U. S. 397, 462; *Connecticut Ins. Co.* v. *Erie Railway*, 73 N. Y. 399; *Platt* v. *Richmond &c. Railroad*, 108 N. Y. 358.

The principal question in the case, therefore, is whether Samuel O. Smith & Co., the owners of the 340 bales of cotton, had any right of action against the defendant railway company for the loss of this cotton by fire.

As sufficiently appears by the bill of exceptions in this case, and more fully by an opinion delivered by the court below in the similar case of *Marine Ins. Co.* v. *St. Louis, Iron Mountain & Southern Railway*, 41 Fed. Rep. 643, 651, 652, the rulings and instructions under which the plaintiffs obtained a verdict proceeded upon the theory that, if the cotton had been suffered to accumulate in the sheds and in the street until, by reason of the danger of its taking fire, it endangered the property of the plaintiffs and others in the immediate vicinity, it was a public nuisance, and the defendant, as matter of law, was guilty of aiding in creating and maintaining that nuisance, and responsible for its consequences, upon three grounds: 1st. That the defendant had not removed the cotton as soon as delivered by the owners to the compress company, as it was authorized and required to do by its contract with that company. 2d. That the defendant must be conclusively presumed to have been in possession of so much of the cotton as it had issued bills of lading for. 3d. That the defendant had made the cotton sheds a receiving station for its railroad, and the compress company its agent to receive and hold the cotton.

The leading facts which the evidence introduced by the plaintiff at the trial tended to prove were as follows:

The defendant railway company had made an oral agreement with the compress company to receive and transport all cotton in bales brought by its owners to the sheds of the compress company; and broke this agreement by neglecting to furnish transportation. For most of the cotton delivered by its owners to the compress company, the railway company had issued bills of lading; but it had issued none for the 340 bales of Smith & Co. By reason of this neglect of the railway company to furnish transportation, and the consequent accumulation of cotton in the sheds of the compress company, a large

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mass of cotton delivered by its owners to the compress company, including the 340 bales, was piled and kept by that company in a public street adjoining its sheds, and, while there, was destroyed by fire from an unknown cause.

So far as concerned the 340 bales, the only contract of the railway company was with the compress company, and was to receive and transport the cotton. The neglect of the railway company to furnish sufficient transportation may have been a breach of that contract, for which the compress company might maintain an action; but it created no liability, in contract or in tort, to the owners or insurers of the cotton, or to any other person. This cotton, certainly, was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no custody or control of it, and no possession of it, actual or constructive; and had no hand in placing or keeping it where it was. The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority, that neglect was not the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers. *Railroad Co.* v. *Reeves*, 10 Wall. 176; *Morrison* v. *Davis*, 20 Penn. St. 171; *Denny* v. *New York Central Railroad*, 13 Gray, 481; *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304; *Dubuque Association* v. *Dubuque*, 30 Iowa, 176; *Daniels* v. *Ballantine*, 23 Ohio St. 532.

The next question is how far the railway company's liability in this action is affected by the fact that it had issued bills of lading for other cotton forming part of the same mass accumulated in the street.

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The course of business was this: The compress company received the cotton from its owners, gave them warehouse receipts for it, and placed and kept it, as it saw fit, in its sheds or in the adjoining street. The railway company, whenever the owners requested, gave them bills of lading in exchange for the receipts of the compress company. After doing this, the railway company gave notice to the compress company, and directed that company to put the cotton on the cars addressed accordingly; and the compress company then insured the cotton in behalf of the railway company, and put the cotton on the cars.

There is nothing else in the case, which has any tendency to show that the railway company had or exercised any control or custody of the cotton, or of the place where it was kept by the compress company, before it was put upon the cars by that company. The railway company evidently neither considered itself, nor was considered by the compress company, as having assumed any responsibility for the care or custody of the cotton, until it had been insured in its behalf and loaded upon its cars. The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or the legal custody of the cotton until it was so loaded. *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 415.

Upon the facts of this case, it may well be doubted whether the liability of the railway company as a common carrier began before the cotton had been received upon its cars, and had thereby come into its actual and exclusive possession and control. *St. Louis, Iron Mountain & Southern Railway* v. *Knight*, 122 U. S. 79, 93, 95. But, however that may be, the court below clearly went too far in instructing the jury that the railway company, merely by giving bills of lading for the cotton, became responsible for a nuisance resulting from the manner and the place in which the cotton was kept by the compress company.

It was suggested that, because by the statute of Arkansas of March 15, 1887, c. 60, all warehousemen and carriers were

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prohibited, under a penalty, from issuing receipts or bills of lading, except for goods which had been actually received into their possession, the railway company must be conclusively presumed to have been in possession of the cotton for which it had issued bills of lading. But it might be argued, with equal force, that this statute prevented the bills of lading from binding the railway company before the cotton was actually received into its possession. If the statute has any bearing, it is only upon the question of fact whether the railway company had or had not any share in the custody and control of the cotton, for which bills of lading had been issued, before it was put upon the cars.

As to the hypothesis that the sheds of the compress company and the adjoining street had been made by the railway company one of its receiving stations, and that the compress company was the agent of the railway company, either in receiving or in holding the cotton, it is enough to say that, if the facts have any tendency to support that hypothesis, they fall far short of conclusively establishing it as matter of law.

The Circuit Court therefore erred in refusing to give the fifth, eleventh and twelfth instructions requested, as well as in the instructions which were given to the jury.

As for this reason the verdict must be set aside and a new trial ordered, at which an amendment in respect to parties may be allowed in the discretion of the court below, we express no opinion upon the question of pleading under the Code of Arkansas, (which is not free from doubt,) whether this action was rightly brought in the name of the insurance companies alone, or whether the assured should have been made a party, either as a plaintiff or as a defendant. See Mansfield's Digest, §§ 473, 4933, 4934; *St. Louis, Iron Mountain & Southern Railway* v. *Camden Bank*, 47 Arkansas, 541, 548.

Judgment reversed, and case remanded, with directions to set aside the verdict and to order a new trial.

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.

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MANCHESTER *v.* MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS FOR THE COUNTY OF BARNSTABLE.

No. 1518. Argued January 14, 15, 1891. — Decided March 16, 1891.

The act of the Legislature of Massachusetts, approved May 6, 1886, (Laws of 1886, c. 192,) "for the protection of the fisheries in Buzzard's Bay," is valid, so far as it relates to the taking of menhaden.

It applies to a vessel which has a license to fish for menhaden under the laws of the United States.

As between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from the coast; and bays wholly within its territory which do not exceed two marine leagues in width at the mouth are within this limit; and included in such territorial jurisdiction is the right of control over fisheries.

The courts of Massachusetts can lawfully take jurisdiction of violations of such statutes, as against the admiralty and maritime jurisdiction of the courts of the United States.

It has always been the doctrine of this court, that whenever a conflict arises between a State and the United States, as to the regulation of commerce or navigation, the authority of the latter is supreme and controlling.

Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test Massachusetts can include Buzzard's Bay within the limits of its counties.

There are no existing treaties or acts of Congress which relate to the menhaden fisheries within such a bay as Buzzard's Bay.

The question is not considered whether or not Congress would have the right to control the menhaden fisheries in question.

By an act of the legislature of the Commonwealth of Massachusetts, approved May 6, 1886, (Laws of 1886, c 192,) entitled "An act for the protection of the fisheries in Buzzard's Bay," it was enacted as follows:

"Section 1. No person shall draw, set, stretch or use any drag net, set net or gill net, purse or sweep seine of any kind for taking fish anywhere in the waters of Buzzard's Bay within the jurisdiction of this Commonwealth, nor in any harbor, cove or bight of said bay except as hereinafter provided.

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"SECTION 2. Any net or seine used in violation of any provision of this act, together with any boat, craft or fishing apparatus employed in such illegal use, and all fish found therewith, shall be forfeited; and it shall be lawful for any inhabitant or inhabitants of any town bordering on said bay to seize and detain, not exceeding forty-eight hours, any net or seine found in use contrary to the provisions of this act, and any boat, craft, fishing apparatus and fish found therewith, to the end that the same may be seized and libelled if need be by due process of law.

"SECTION 3. All nets and seines in actual use set or stretched in the waters aforesaid in violation of this act are declared to be common nuisances.

"SECTION 4. Nothing contained in this act shall be construed to interfere with the corporate rights of any fishing company located on said bay nor in any way to affect the fish weirs mentioned in section seventy of chapter ninety-one of the Public Statutes, nor the use of nets or seines in lawful fisheries for shad or alewives in influent streams of said bay, nor to the use of set nets or gill nets in the waters of the town of Fairhaven within a line drawn from Commorant rock southwesterly to the buoy on West Island Rips and from thence westerly in a straight course through the buoy on West Island Ledge to the town line of Fairhaven.

"SECTION 5. Whoever violates any provision of this act or aids or assists in violating the same shall pay a fine not exceeding two hundred dollars for each offence.

"SECTION 6. District courts and trial justices shall have concurrent jurisdiction with the Superior Court of all offences and proceedings under the provisions of this act.

"SECTION 7. All fines received under this act shall be paid one-half to the complainant and the other half to the Commonwealth. All moneys from any forfeitures incurred under this act shall inure and be paid one-fourth to the informer and one-fourth to the person filing the libel and the other half to the Commonwealth."

Under that statute, a complaint in writing under oath was made on behalf of the Commonwealth, before a trial justice

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in and for the county of Barnstable, in Massachusetts, that Arthur Manchester, at Falmouth, in the county of Barnstable, on the 19th day of July, in the year 1889, did then and there draw, set, stretch and use a purse seine for the taking of fish in the waters of Buzzard's Bay, within the jurisdiction of the Commonwealth. Under a warrant issued on this complaint, Manchester was, on the 1st of August, 1889, brought before the trial justice, and pleaded not guilty. The justice found him guilty, on a hearing of the case, and imposed upon him a fine of $100, to the use of the Commonwealth, and costs, and ordered that, if the fine and costs should not be paid, he should be committed to jail, there to be kept until he should pay them, or be otherwise discharged by due course of law.

The defendant appealed to the Superior Court of Barnstable County. In that court, the case was, according to the statute, tried by a jury, which found the defendant guilty. That court reported the case for the determination of the Supreme Judicial Court of the Commonwealth, which heard it, and on the 18th of September, 1890, made an order that judgment should be rendered on the verdict. On the rescript being received by the Superior Court, it affirmed the judgment of the trial justice, and directed the defendant to pay a fine of $100 and the costs of prosecution, and stand committed until he should comply with the order.

The report of the Superior Court, signed by a justice thereof, was as follows: "This was a complaint under section 1 of chapter 192 of the statutes of 1886. A copy of the complaint is annexed and made a part of this report. The evidence of the Commonwealth tended to show that the defendant and others, who were citizens of Rhode Island and were officers and crew of the fishing steamer called the 'A. T. Serrell,' on the day named in the complaint were engaged in drawing, setting, stretching and using a purse seine for the taking of fish in the waters of Buzzard's Bay. The place where the defendant was so engaged with said seine was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of said town to the south line thereof. The point where the defendant was so using said

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seine was within that part of Buzzard's Bay which the harbor and land commissioners, acting under the provisions of section 2 of chapter 196 of the acts of the year 1881, had, so far as they were capable of doing so, assigned to and made a part of the town of Falmouth. A copy of the map showing boundary lines between the adjacent cities and towns bordering on Buzzard's Bay, as so located by said commissioners, was used at the trial and may be referred to. The point where the defendant was using said seine is marked 'A' on said plan. The Commonwealth's evidence tended to show that the defendant and his associates, on said day and at the point described, caught with said seine a large quantity of the fish called menhaden. In this act of fishing no fixed apparatus was used and the bottom of the sea was not encroached upon or disturbed. The Commonwealth further offered evidence tending to show that the distance between the headlands at the mouth of Buzzard's Bay, viz., at Westport, in the county of Bristol, on the one side, and the island of Cuttyhunk, in the county of Dukes, on the other side, was more than one and less than two marine leagues. The island of Cuttyhunk is the most southerly of the chain of islands lying to the eastward of Buzzard's Bay, and known as the Elizabeth Islands. The distance across said bay at the point where the acts of the defendant were done is more than two marine leagues, and the opposite points are in different counties. The defendant did not dispute any of the testimony offered by the Commonwealth, but introduced evidence tending to show that he was engaged in fishing for menhaden only, and that he caught no other fish excepting menhaden; that menhaden is not a food fish and is only valuable for the purpose of bait and of manufacture into fish oil; and that the taking of said menhaden by seining does not tend in any way to decrease the quantity and variety of food fishes. The defendant offered evidence further tending to show that he was in the employ of the firm of Charles Cook and others, who were engaged in the State of Rhode Island in the business of seining menhaden to be sold for bait and to be manufactured into fish oil and fish manure. The defendant further offered testimony tending to show that it was impossible to

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discern objects across from one headland to the other at the mouth of Buzzard's Bay. The defendant's evidence showed that the said steamer was of Newport, Rhode Island, duly enrolled and licensed at that port, under the laws of the United States, for carrying on the menhaden fishery, and it was conceded by the Commonwealth that the defendant was employed upon the vessel described by said enrolment and license, and, at the time of the commission of the acts complained of, he and his associates were so in the employ of the vessel described in said license. The district attorney stated that he should not controvert any of the foregoing evidence, but claimed that it was incompetent in defence of this complaint; but for the purposes of the trial I admitted the testimony. The foregoing is all the evidence offered at the trial of this complaint. It was conceded that the defendant could not be convicted if chapter 212 of the acts of 1865 was not repealed by the statute of 1886, chapter 192. At the conclusion of the evidence the defendant asked me to rule as follows: 1. As the government does not claim that the act complained of is in violation of any statute except of chapter 192 of the acts of 1886, the defendant, notwithstanding that statute, is authorized to take menhaden by the use of the purse seine, in the waters of Buzzard's Bay in the place where this act was committed. 2. Chapter 192 of the acts of the year 1886 did not repeal chapter 212 of the acts of the year 1865. 3. The defendant may lawfully take menhaden, by the use of the purse seine, in Buzzard's Bay, in the place where the acts complained of in this case were done. And also: 1. The act complained of was on the high seas and without the jurisdiction of Massachusetts. 2. The act complained of having been done under a United States license for carrying on this fishery, the defendant cannot be held as a criminal for violating a statute of this Commonwealth. 3. The defendant cannot be held unless the act complained of was done and committed within the body of a county, as understood at common law. 4. The statute of this Commonwealth prohibiting under a penalty the use of nets and seines and the taking of fish within three miles of the shore is invalid, especially as against a license to fish granted

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under the laws of the United States. The defendant further asked me to rule that on all the evidence the defendant could not be convicted. . I declined to rule as requested by the defendant and submitted the case to the jury, with the instruction that the statute of 1865 was repealed by the statute of 1886, and with the instruction that, if they found that the defendant was engaged in using a purse seine for the taking of fish of any kind in that part of Buzzard's Bay which was within the jurisdiction of the Commonwealth of Massachusetts, they would be authorized to convict the defendant, and that the place where the acts of the defendant were committed, being within a marine league from the shore at low-water mark, was within the jurisdiction of the Commonwealth. The jury returned a verdict of guilty; and now, after verdict and at the request of the defendant, and by the consent of the parties, I report the case, with my rulings at the trial of the same, for the determination of the Supreme Judicial Court."

The Supreme Judicial Court held the statute in question to be constitutional and valid, and delivered an opinion, by Chief Justice Field, which is reported in 152 Mass. 230.

The defendant sued out a writ of error directed to the Superior Court, to review its judgment, and assigned as errors, that the court ruled and adjudged: "1. That the place where the alleged offence was committed was not a part of the high seas and was not, under article 3, section 2, of the Constitution, which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, within the exclusive jurisdiction of the federal government. 2. That said place, notwithstanding said provision of the Constitution, was within the jurisdiction of Massachusetts. 3. That the plaintiff in error was not authorized to do the act complained of by a license under Title 50 of the Revised Statutes, and was not protected by such license. 4. That chapter 192 of the acts of the General Court of Massachusetts for the year 1886, as construed by the court, was valid notwithstanding the provisions of the Constitution and laws above cited, or any provisions of the Constitution and laws of the United States."

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Argument for Plaintiff in Error.

Mr. Joseph H. Choate and *Mr. James F. Jackson* for plaintiff in error.

I. At the time of the treaty of Paris, in 1783, the territorial domain of England extended upon her coast to low-water mark, including all bays, harbors and inlets within the "*fauces terræ*, where a man can reasonably discern from shore to shore."

Within these limits was "the body of the county." Within them the title to tide waters and the soil beneath was in the crown.

Without these limits were the "high seas," the common property of all nations. Over them England, as one of the common sovereigns of the ocean, had certain rights of jurisdiction and dominion derived from and sanctioned by the agreement of nations, express or implied.

Such jurisdiction and dominion she had for all purposes of self-defence and for the regulation of coast fisheries.

The exercise of such rights over adjacent waters would not necessarily be limited to a three-mile belt, but would undoubtedly be sanctioned as far as reasonably necessary to secure the practical benefits of their possession.

If self-defence or regulation of fisheries should reasonably require assumption of control to a greater distance than three miles, it would undoubtedly be acquiesced in by other nations.

The *marine-league* distance has acquired prominence merely because of its adoption as a boundary in certain agreements and treaties and from its frequent mention in text books, but has never been established in law as a fixed boundary.

These rights belonged to England as a member of the family of nations, and did not constitute her the possessor of a proprietary title in any part of the high seas nor add any portion of these waters to her realm. In their nature they were rights of dominion and sovereignty rather than of property.

This question is very fully considered and the authorities examined in a recent case. *Regina* v. *Keyn*, 2 Ex. D. 63.

The law of England was introduced and established in the colonies. The characteristic features of the property title of

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the crown in the seashore, with its limit at low-water mark, were recognized as distinguished from the peculiar rights of sovereignty called "regalia." *Commonwealth* v. *Alger*, 7 Cush. 53, 83; *Commonwealth* v. *Roxbury*, 9 Gray, 451; *Martin* v. *Waddell*, 16 Pet. 367.

The distinction between *high seas* and *tide waters within the body of the county* has been generally recognized. *Commonwealth* v. *Peters*, 12 Met. 387; *United States* v. *Grush*, 5 Mason, 290; 1 Kent Comm. 396.

Such, then, was the territorial domain and such the extra-territorial right of jurisdiction which Massachusetts possessed and could have exercised as an independent State when she adopted the federal Constitution.

As an independent nation she could have undoubtedly enacted a statute like the one under discussion, which her own courts would have enforced and which other nations would have recognized.

II. To what extent did she under the Constitution surrender this right of control over the fisheries of the ocean?

(1) Whatever dominion or rights exist in the high seas are determined by international law and rest solely upon the common consent of nations, which may be express, but is more generally implied.

Whatever of such rights Massachusetts possessed previous to the formation of the federal government she possessed wholly by virtue of an agreement between herself as a nation and other nations.

When she became a State in the Union she not only on general principles merged her nationality in that of the United States, but by express concession she agreed to these clauses of the Constitution. Art. I., section 10. "No State shall enter into any treaty, alliance or confederation." "No State shall without the consent of Congress enter into any agreement or compact with another State or with a foreign power."

Thus Massachusetts was cut off from entering into such agreements with foreign nations as make up the body of international law. Not only could she enter into no new agreement, but the continuance of existing agreements and

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contractual relations was terminated. When Massachusetts adopted the Constitution she gave up her international dealings and ceased to be a party to the usages and agreements by which they are governed.

The control over the fisheries of the ocean, resting as it did upon such agreement and usage, was surrendered with the power to contract with other sovereign States. This was not a surrender of territory that belonged to her, but of dominion over the common territory of the nations. Her title to her own territory, as known and defined by law, she still retained. Story on Const. § 1673.

"The Pacific Ocean belongs to no one nation, but is the common property of all." *Lord* v. *Steamship Co.* 102 U. S. 541. Is every seaboard State of the Union one of these owners and the United States without such ownership? Do these States have the right to take possession and control of the high seas as far as they shall see fit and assert each its own ideas and claims of right under international law and usage? Are the inland States without interest or authority in this common ocean and what it contains?

It is certainly a subject of more or less disagreement between nations how far rights of dominion upon the sea extend, giving rise to various assertions and claims. No absolute limit has yet been fixed upon. Nothing more has thus far been settled than that these rights extend to at least three miles from shore.

It is difficult to believe that this question is one to be settled between foreign nations and each of the seaboard States dealing with one another as common sovereigns of the sea. We contend, on the contrary, that rights over the waters adjacent to our coast and a part of the ocean, "the property of no one nation," are rights of dominion recognized and established between nations by virtue of their national character and to determine international relations; that as such the merging of the national character by the several States into the United States by the adoption of the Constitution transferred by necessary implication and express provision the exercise of these rights.

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(2) Another clause of the Constitution is to be considered: "The judicial power shall extend to all cases of admiralty and maritime jurisdiction." Constitution, Art. III., sec. 2.

This grant to the federal head of the power to establish the only courts which had any jurisdiction whatever upon the high seas is only consistent with the view that the rights to be protected were national rights and should be enforced in national courts. *Commonwealth* v. *Peters*, 12 Met. 387; 1 Kent Com. 367, 397; *United States* v. *Grush*, 5 Mason, 290; Story Const. § 1673.

The distinction between the jurisdiction left in the States over localities within their territory, within the body of a county, and the jurisdiction transferred to the United States is clearly stated in *Commonwealth* v. *Peters*, where the chief justice says: "Supposing the case stood upon the Constitution of the United States alone, without any legislation by Congress, the natural conclusion would be that the purpose of the Constitution was to transfer to the government of the United States all the admiralty and maritime jurisdiction over cases, civil and criminal, which had been exercised in England by the courts of admiralty and the special commissioners for the trial of maritime causes, and that all other judicial power would remain to the State. This would leave the courts of the State all the jurisdiction of all cases occurring upon rivers and other places within the ebb and flow of the tide lying within the body of any county."

This clause is not to be construed as a "cession of the waters," but simply of jurisdiction. The State did not own the ocean and had no waters to cede.

Nor is it contended that the jurisdiction of a State is not "coextensive with its territory." Our argument is that the territory of Massachusetts was defined under the law of England, and that when she adopted the Constitution her domain was limited, as far as proprietary title is concerned, by the body of the county, in accordance with the established principles of that law.

It was *without this territory* that the offence with which Manchester is charged took place, in a locality where legisla-

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tive control did not rest upon title in the soil and waters, but upon rights of sovereignty inseparably connected with national character, and which had always been exclusively intrusted to enforcement in admiralty courts. The transfer of the power to establish these courts, with their recognized exclusive jurisdiction over the high seas, was equivalent to the transfer of the right of control over those seas.

This view is in accord with the decisions of the courts. In all cases when the state courts have been held to have jurisdiction, the locality has been admitted to be within the territorial boundaries of the State.

Within such boundaries the common law courts of the State continue to have jurisdiction, the State continues to own her fisheries. *United States* v. *Bevans*, 3 Wheat. 336, 387; *Smith* v. *Maryland*, 18 How. 71. In the latter case Mr. Justice Curtis says "this power results from the ownership of the soil."

It is true that *within the tide waters of the State* "there has been no grant of power over the fisheries" to the United States. *McCready* v. *Virginia*, 94 U. S. 391. That the State had no jurisdiction upon the ocean within three miles of shore was necessarily the decision of the court in the application of the Crimes Act of 1790 to an offence off Newburyport. *United States* v. *Smith*, 1 Mason, 147; *United States* v. *Kessler*, Baldwin, 15, 35. Could Massachusetts, under chapter 289 of the acts of 1859, oust the United States of its jurisdiction?

The transfer of this exclusive jurisdiction over the high seas to the national courts was consistent with the true purposes of the Union. Such jurisdiction belongs to the federal authorities for the best of reasons. Story Const. § 1673. The admiralty jurisdiction of the United States, as compared with that of England, has been *extended* but never *abridged*.

(3) "The Congress shall have power to regulate commerce with foreign nations and among the several States." Fishing upon the high seas is in its nature an integral part of national commerce, and its control and regulation are necessarily vested in Congress and not in the individual States. To secure the benefit of such national control and regulation of the fisheries was one of the express purposes of the Union.

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The fisheries of the ocean were viewed as of national importance, as one of the principal sources of maritime power and of interstate and foreign commerce, and it was believed that one of the great benefits to be obtained from the federal union was to be *their control by a uniform law and protection by national authority.* The taking of fish in the ocean is an act necessarily bringing those engaged in it into contact with other nations. What is true of the simple act of navigation upon an ocean is still more true of fishing there. See *Lord* v. *Steamship Co.*, 102 U. S. 541. Can there be any doubt, following the reasoning in that case, that the control of the vessels engaged in taking menhaden upon the high seas is vested exclusively in Congress as a part of our external commerce?

The principles to be applied under this clause of the Constitution have been stated in many cases and very fully in the recent case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. From the principles there laid down it would seem to be free from doubt that the *ocean fisheries* or *coast fisheries*, as they are termed, are national in character and in importance.

They were so considered previous to and at the formation of the Constitution; they have been ever since a most important feature of national policy and occupied prominent position in our treaties; they "enter into the national policy, affect national rights, and may compromit the national sovereignty;" in the taking of the fish and in the navigation of the ocean they are inseparably connected with the interests of the country as a whole and its people as citizens of the United States; they constantly bring those engaged in this branch of commerce in contact with the rights and privileges of other nations.

That the welfare of these national industries requires one uniform system of regulation seems apparent.

Whether it be mackerel, cod or menhaden fisheries, what more embarrassing and destructive of their proper conduct than to have twenty-two different systems of laws and regulations controlling the same industry along our shores?

Nothing is more certain than that the just regulation of

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different fisheries demands careful investigation into the facts relating to them, freedom from prejudiced and vexatious local legislation, and a protection that can only be secured from congressional control.

This question does not affect menhaden fisheries alone, but the mackerel, cod, and other fisheries as well. The fickleness and injustice of state legislation must always subject to the varying whims of local ignorance or prejudice an important industry, involving the outlay of a large amount of capital, upon which great commercial interests depend, an industry fruitful, too, of national blessing, in the building of ships and in the education of mariners.

Moreover, even if the subject matter of ocean fisheries were deemed to be of such a nature that the States might make and enforce regulation thereof until the contrary intent of Congress appeared, the purpose of Congress to take this regulation into its own control has been plainly manifested.

Under its joint resolution of February 9, 1871, in establishing the Fish Commission, and under Title LI of the Revised Statutes, entitled "Regulation of the Fisheries," it has assumed the regulation of the coast fisheries in all such respects as are covered by the Massachusetts statute under which Manchester was convicted. It has made it the duty of the Fish Commissioner to investigate the facts and report whether any, and, if so, what, protective, prohibitory or precautionary measures shall be adopted in the premises.

This must have been done with a view of passing all such laws as should be necessary for the protection of the food fishes of the coast.

Again Congress took action in the enactment of chapter 288 of the statutes of 1887 relating to the mackerel fisheries.

It took action under the statutes relating to bounties, privileges and agreements in 1792, in 1793 and in 1813, and in the granting of the license under which the plaintiff in error was fishing.

Whatever construction has been put upon such a license in cases where the rights of the licensee have been affected by state legislation, it has never been denied that such a

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license is a grant of authority, as held in *Gibbons* v. *Ogden*, 9 Wheat. 1.

When Congress enacted the law under which the plaintiff in error took out his license its power to regulate this fishery was exercised, and no prohibitory statute of a State could defeat his right to fish in the *high seas* under it.

In the case of *Smith* v. *Maryland*, where such a license was considered, the locality was admittedly within the territory of the State and the state law was held valid under its right to protect its own territory and property.

In each of the cases relating to the regulation of shell fish the decision rests upon a state of facts in which it is conceded that the fish were within the territory and soil of the State.

We do not question the right of the State to regulate its own fisheries within its own soil or tide waters.

The United States has in her treaties with foreign powers several times disposed of these fisheries as though they belonged to her and not as though they were the property of the individual States.

Commerce with the nations is constantly concerned with them, either through rights and privileges determined by treaties or those determined by the general consent of the common sovereigns of the ocean.

The menhaden fishery, with all its ramifications, inseparably connected as it is with the food fisheries and markets of the world, is practically destroyed by such legislation as that of Massachusetts, based upon an unjust discrimination and lack of such investigation as is being now carried on by authority of Congress.

It is the exclusion by the State of an important business connected with the commerce of the nations, authorized by national license, not from its own domain, where it might be claimed to be a matter of internal concern, but from the high seas, where it is necessarily a matter of external concern and carried on in contact with and together with all mankind.

Mr. Henry C. Bliss, Assistant Attorney General of Massachusetts, with whom on the brief was *Mr. Andrew J. Water-*

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man, Attorney General of that Commonwealth, for defendant in error.

MR. JUSTICE BLATCHFORD, after stating the case, delivered the opinion of the court.

The principal contentions in this court on the part of the defendant are that, although Massachusetts, if an independent nation, could have enacted a statute like the one in question, which her own courts would have enforced and which other nations would have recognized, yet when she became one of the United States, she surrendered to the general government her right of control over the fisheries of the ocean, and transferred to it her rights over the waters adjacent to the coast and a part of the ocean; that, as by the Constitution, article 3, section 2, the judicial power of the United States is made to extend to all cases of admiralty and maritime jurisdiction, it is consistent only with that view that the rights in respect of fisheries should be regarded as national rights, and be enforced only in national courts; that the proprietary right of Massachusetts is confined to the body of the county; that the offence committed by the defendant was committed outside of that territory, in a locality where legislative control did not rest upon title in the soil and waters, but upon rights of sovereignty inseparably connected with national character, and which were intrusted exclusively to enforcement in admiralty courts; that the Commonwealth has no jurisdiction upon the ocean within three miles of the shore; that it could not, by the statute in question, oust the United States of jurisdiction; that fishing upon the high seas is in its nature an integral part of national commerce, and its control and regulation are necessarily vested in Congress and not in the individual States; that Congress has manifested its purpose to take the regulation of coast fisheries, in the particulars covered by the Massachusetts statute in question, by the joint resolution of Congress of February 9, 1871, (16 Stat. 593,) establishing the Fish Commission, and by Title 51 of the Revised Statutes, entitled "Regulation of Fisheries," and by the act of

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February 28, 1887, c. 288, (24 Stat. 434,) relating to the mackerel fisheries, and by acts relating to bounties, privileges, and agreements, and by granting the license under which the defendant's steamer was fishing; and that, in view of the act of Congress authorizing such license, no statute of a State could defeat the right of the defendant to fish in the high seas under it.

By the Public Statutes of Massachusetts, part 1, title 1, c. 1, sections 1 and 2, it is enacted as follows: "Section 1. The territorial limits of this Commonwealth extend one marine league from its seashore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line. Section 2. The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof; subject to the rights of concurrent jurisdiction granted over places ceded to the United States." The same Public Statutes, part 1, title 1, c. 22, section 1, contain the following provision: "The boundaries of counties bordering on the sea shall extend to the line of the Commonwealth, as defined in section one of chapter one." Section 11 of the same chapter is as follows: "The jurisdiction of counties separated by waters within the jurisdiction of the Commonwealth shall be concurrent upon and over such waters." By section 2 of chapter 196 of the acts of Massachusetts of 1881, it is provided as follows: "Section 2. The harbor and land commissioners shall locate and define the courses of the boundary lines between adjacent cities and towns bordering upon the sea and upon arms of the sea from high-water mark outward to the line of the Commonwealth, as defined in said section one, [section one of chapter one of the General Statutes,] so that the same shall conform as nearly as may be to the course of the boundary lines between said adjacent cities and towns on the land; and they shall file a report of their doings with suitable plans and exhibits, showing the boundary lines of any town by them located and defined, in the registry of deeds in which deeds of real estate situated in such town are required to be recorded, and also in the office of the secretary of the Commonwealth."

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The report of the Superior Court states that the point where the defendant was using the seine was within that part of Buzzard's Bay which the harbor and land commissioners, acting under the provisions of the act of 1881, had, so far as they were capable of doing so, assigned to and made part of the town of Falmouth; that the distance between the headlands at the mouth of Buzzard's Bay "was more than one and less than two marine leagues;" that "the distance across said bay, at the point where the acts of the defendant were done, is more than two marine leagues, and the opposite points are in different counties;" and that "the place where the defendant was so engaged with said seine was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of" the town of Falmouth "to the south line" of that town.

Buzzard's Bay lies wholly within the territory of Massachusetts, having Barnstable County on the one side of it, and the counties of Bristol and Plymouth on the other. The defendant offered evidence that he was fishing for menhaden only, with a purse seine; that "the bottom of the sea was not encroached upon or disturbed;" "that it was impossible to discern objects across from one headland to the other at the mouth of Buzzard's Bay;" and that the steamer was duly enrolled and licensed at the port of Newport, Rhode Island, under the laws of the United States, for carrying on the menhaden fishery.

By section 1 of chapter 196 of the laws of Massachusetts of 1881, it was enacted as follows: "Section 1. The boundaries of cities and towns bordering upon the sea shall extend to the line of the Commonwealth as the same is defined in section one of chapter one of the General Statutes." Section 1 of chapter 1 of the General Statutes contains the provisions before recited as now contained in the Public Statutes, chapter 1, section 1, and chapter 22, sections 1 and 11. Buzzard's Bay was undoubtedly within the territory described in the charter of the Colony of New Plymouth and the Province charter. By the definitive treaty of peace of September 3, 1783, between the United States and Great Britain, (8 Stat. 81,) His

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Britannic Majesty acknowledged the United States, of which Massachusetts Bay was one, to be free, sovereign and independent States, and declared that he treated with them as such, and, for himself, his heirs and successors, relinquished all claims to the government, propriety and territorial rights of the same and every part thereof. Therefore, if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations, and her right to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues, or six geographical miles, apart, have always been regarded as a part of the territory of the nation in which they lie. Proceedings of the Halifax Commission of 1877, under the Treaty of Washington of May 8, 1871, Executive Document No. 89, 45th Congress, 2d session, Ho. Reps., pp. 120, 121, 166.

On this branch of the subject the case of *The Queen* v. *Keyn*, 2 Ex. D. 63, is cited for the plaintiff in error, but there the question was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offences committed on the open sea; and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. In all the cases cited in the opinions delivered in *The Queen* v. *Keyn*, wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore, belongs to the nation on whose coast the fisheries are prosecuted.

In *Direct U. S. Cable Co.* v. *Anglo-American Tel. Co.*, 2 App. Cas. 394, it became necessary for the Privy Council to determine whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was a part of the terri-

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tory of Newfoundland, and within the jurisdiction of its legislature. The average width of the bay was about fifteen miles, and the distance between its headlands was rather more than twenty miles; but it was held that Conception Bay was a part of the territory of Newfoundland, because the British government had exercised exclusive dominion over it, with the acquiescence of other nations, and it had been declared by act of Parliament "to be part of the British territory, and part of the country made subject to the legislature of Newfoundland."

We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit. Gould on Waters, part 1, c. 1, §§ 1–17, and notes; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135; *Gammell* v. *Commissioners*, 3 Macq. 419; *Mowat* v. *McFee*, 5 Sup. Ct. of Canada, 66; *The Queen* v. *Cubitt*, 22 Q. B. D. 622; St. 46 & 47 Vict. c. 22.

It is further insisted by the plaintiff in error, that the control of the fisheries of Buzzard's Bay is, by the Constitution of the United States, exclusively with the United States, and that the statute of Massachusetts is repugnant to that Constitution and to the laws of the United States.

In *Dunham* v. *Lamphere*, 3 Gray, 268, it was held, (Chief Justice Shaw delivering the opinion of the court,) that in the distribution of powers between the general and State governments, the right to the fisheries and the power to regulate the fisheries on the coasts and in the tide-waters of the State, were left, by the Constitution of the United States, with the States, subject only to such powers as Congress may justly

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exercise in the regulation of commerce, foreign and domestic. In the present case the court below was asked to reconsider that decision, mainly on the ground that the admiralty and maritime jurisdiction of the courts of the United States was not considered in the opinion, and that the recent decisions of the Supreme Court of the United States, on the power of Congress to regulate commerce, required that the decision be reconsidered; but the court stated that no recent decisions of this court had been cited which related to the regulation of fisheries within the territorial tide-waters of a State, and that the decisions of this court which related to that subject did not appear to be in conflict with the decision in *Dunham* v. *Lamphere*, and that it never had been decided anywhere that the regulation of the fisheries within the territorial limits of a State was a regulation of commerce.

It is further contended that by the Constitution of the United States the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and is exclusive; that this case is within such jurisdiction; and that therefore, the courts of Massachusetts have no jurisdiction over it. In *McCready* v. *Virginia*, 94 U. S. 391, the question involved was, whether the State of Virginia could prohibit the citizens of other States from planting oysters in Ware River, a stream in Virginia where the tide ebbed and flowed, when her own citizens had that privilege. In that case it was said, that the principle had long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away; and that, in like manner, the States own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running; and this court added, in its opinion: "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish,

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so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

In *Smith* v. *Maryland*, 18 How. 71, 74, a vessel licensed to be employed in the coasting trade and fisheries, was seized by the sheriff of Anne Arundel County in Maryland, while engaged in dredging for oysters in Chesapeake Bay, in violation of a statute of Maryland enacted for the purpose of preventing the destruction of oysters in the waters of that State; and the questions presented were whether that statute was repugnant to the provisions of the Constitution of the United States which grant to Congress the power to regulate commerce, or to those which declare that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, or to those which declare that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Mr. Justice Curtis, in delivering the opinion of this court, said: "Whatever soil below low-water mark is the subject of exclusive property and ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory, before the declaration of independence. *Pollard* v. *Hagan*, 3 How. 212; *Martin* v. *Waddell*, 16 Pet. 367; *Den* v. *The Jersey Co.*, 15 How. 426. But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish." He also said that the statute of Maryland does "not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed

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in common by all citizens of the United States; whether this public use may be restricted by the State to its own citizens or a part of them, or by force of the Constitution of the United States must remain common to all citizens of the United States; whether the national government, by a treaty or act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the State holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case, and upon which we give no opinion." Upon the question of the admiralty jurisdiction, he said: "But we consider it to have been settled by this court, in *United States* v. *Bevans*, 3 Wheat. 336, that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution." The court also held that the act was not repugnant to the clause of the Constitution which conferred upon Congress the power to regulate commerce, and that the enrolment and license of the vessel gave to the plaintiff in error no right to violate the statute of Maryland. It is said in the opinion that "no question was made in the court below whether the place in question be within the territory of the State. The law is, in terms, limited to the waters of the State;" and the question, therefore, did not arise "whether a voyage of a vessel, licensed and enrolled for the coasting trade, had been interrupted by force of a law of a State while on the high seas, and out of the territorial jurisdiction of such State." The dimensions of Chesapeake Bay do not appear in the report of the case, but it has been said that this bay is "twelve miles across at the ocean." 1 Bish. Crim. Law, § 105. It is a bay considerably larger than Buzzard's Bay, and is not wholly within the State of Maryland, although at the point where

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Anne Arundel County bounds upon it it is wholly in that State. *Haney* v. *Compton*, 7 Vroom, (36 N. J. Law,) 507; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Weston* v. *Sampson*, 8 Cush. 347; *S. C.* 54 Am. Dec. 764; *Mahler* v. *Norwich & New York Transportation Co.*, 35 N. Y. 352; *United States* v. *Smiley*, 6 Sawyer, 640.

In the case of *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, in the Circuit Court for the District of New Jersey, Mr. Justice Bradley shows clearly that there is no necessary conflict between the right of the State to regulate the fisheries in a given locality and the right of the United States to regulate commerce and navigation in the same locality. He says that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the Province of New Jersey belonged to the King of Great Britain, and, after the conquest, those lands were held by the State, as they were by the King, in trust for the public uses of navigation and fishery. He adds: "It is true that to utilize the fisheries, especially those of shell-fish, it was necessary to parcel them out to particular operators. . . . The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams. . . . So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress." The doctrine has always been firmly maintained by this court, that whenever a conflict arises between a State and the United States, as to the regulation of commerce or navigation, the authority of the latter is supreme and controlling.

Under the grant by the Constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of Congress, personal suits on maritime contracts or for maritime torts can be maintained in the state courts; and the courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S.

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527; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *Leon* v. *Galceran*, 11 Wall. 185; *Steamboat Co.* v. *Chase*, 16 Wall. 522; *S. C.* 9 R. I. 419; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Insurance Co.* v. *Dunham*, 11 Wall. 1; *Jones* v. *United States*, 137 U. S. 202, 211. In each of the cases of *United States* v. *Bevans*, 3 Wheat. 336, and of *Commonwealth* v. *Peters*, 12 Met. 387, the place where the offence was committed was in Boston Harbor; and it was held to be within the jurisdiction of Massachusetts, according to the meaning of the statutes of the United States which punished certain offences committed upon the high seas or in any river, haven, basin or bay "out of the jurisdiction of any particular State." The test applied in *Commonwealth* v. *Peters*, which was decided in the year 1847, was that the place was within a bay "not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side," and was therefore within the body of a county. In *United States* v. *Bevans*, Marshall, C. J., said: "The jurisdiction of a State is coextensive with its territory; coextensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States." If the place where the offence charged in this case was committed is within the general jurisdiction of Massachusetts, then, according to the principles declared in *Smith* v. *Maryland*, the statute in question is not repugnant to the Constitution and laws of the United States.

It is also contended that the jurisdiction of a State as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary

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law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State. In *United States* v. *Bevans*, Marshall, C. J., in the opinion, asks the following questions: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?" "As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws, of Massachusetts?" The statutes of the United States define and punish but few offences on the high seas, and, unless other offences when committed in the sea near the coast can be punished by the States, there is a large immunity from punishment for acts which ought to be punishable as criminal. Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.

The statutes of Massachusetts, in regard to bays at least, make definite boundaries which, before the passage of the statutes, were somewhat indefinite; and Rhode Island and some other States have passed similar statutes defining their boundaries. Public Statutes of Rhode Island, 1882, c. 1, §§ 1, 2; c. 3, § 6; Gould on Waters, § 16 and note. The waters of Buzzard's Bay are, of course, navigable waters of the United States, and the jurisdiction of Massachusetts over them is necessarily limited, *Commonwealth* v. *King*, 150 Mass. 221; but there is no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters, because there are no existing treaties or acts of Congress which relate to the menhaden fish

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eries within such a bay. The rights granted to British subjects by the treaties of June 5, 1854, and May 8, 1871, to take fish upon the shores of the United States, had expired before the statute of Massachusetts (St. 1886, c. 192) was passed which the defendant is charged with violating. The Fish Commission was instituted "for the protection and preservation of the food fishes of the coast of the United States." Title 51 of the Revised Statutes relates solely to food fisheries, and so does the act of 1887. Nor are we referred to any decision which holds that the other acts of Congress alluded to apply to fisheries for menhaden, which is found as a fact in this case not to be a food fish, and to be only valuable for the purpose of bait and of manufacture into fish oil.

The statute of Massachusetts which the defendant is charged with violating is, in terms, confined to waters "within the jurisdiction of this Commonwealth;" and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States.

It may be observed, that § 4398 of the Revised Statutes, (a reënactment of § 4 of the joint resolution of February 9, 1871,) provides as follows, in regard to the Commissioner of Fish and Fisheries: "The commissioner may take or cause to be taken at all times, in the waters of the seacoast of the United States, where the tide ebbs and flows, and also in the waters of the lakes, such fish or specimens thereof as may in his judgment, from time to time, be needful or proper for the

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conduct of his duties, any law, custom, or usage of any State to the contrary notwithstanding." This enactment may not improperly be construed as suggesting that, as against the law of a State, the Fish Commissioner might not otherwise have the right to take fish in places covered by the state law.

The pertinent observation may be made that, as Congress does not assert, by legislation, a right to control pilots in the bays, inlets, rivers, harbors, and ports of the United States, but leaves the regulation of that matter to the States, *Cooley* v. *Board of Wardens*, 12 How. 299, so, if it does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays.

We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State.

Judgment affirmed.

ETHERIDGE *v.* SPERRY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 186. Submitted March 2, 1891. — Decided March 23, 1891.

Buck v. *Colbath*, 3 Wall. 334, affirmed on the point that a suit prosecuted in the state courts to the highest court of such State against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper federal court, presents a case for a writ of error to this court, when the final decision of that court is against the validity of the authority thus set up by the marshal.

Following the Supreme Court of Iowa in its construction of the local law of that State this court holds that a mortgage of a stock of goods in a

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store in that State, otherwise valid, is not invalidated by reason of a parol understanding at the time of its execution, that the mortgagor may retain possession, and sell the goods, and apply the proceeds to his own support, and to keep up the stock, applying only the surplus to the payment of the mortgage debt.

There is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each State as decisive in respect to any case arising therein.

THE case is stated in the opinion.

Mr. F. W. Lehmann and *Mr. N. W. Bliss* for plaintiff in error.

Mr. Henry S. Wilcox for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The plaintiff in error was deputy United States marshal for the Southern District of Iowa. Into his hands was placed a writ of attachment, issued out of the Circuit Court of the United States for that district, in the case of *Marshall, Field & Co.* v. *George W. Hamilton.* Under that writ he levied upon the major portion of a stock of goods in the possession of the defendant Hamilton, the owner of a country store in the town of Knoxville, Iowa. The goods thus levied upon were subsequently sold by order of the court. The defendants in error were creditors of George W. Hamilton, secured by two chattel mortgages on the goods levied upon. After demand they commenced their action in the state court to recover so much of the value of the goods levied upon by the plaintiff in error as would satisfy their debts, with interest. The trial in that court resulted in a judgment in their favor. The judgment was affirmed by the Supreme Court of the State, and from such judgment of affirmance the case comes here on error. As to the jurisdiction of this court, see *Buck* v. *Colbath*, 3 Wall. 334.

It appears that the value of the goods taken on the attachment was considerably in excess of the amount of the mortgage debts; so that if these mortgagees were entitled to recover

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anything, they were entitled to recover the full amount of their debts. It also appears that Hamilton had no property in the State of Iowa, subject to execution, other than this stock of goods; and that the portion of the stock not taken on the attachment was appropriated in satisfaction of a prior mortgage. These mortgagees had no other security. The case, therefore, narrows itself to the question whether these chattel mortgages were valid. They were executed respectively July 4 and July 5, 1882, and were filed for record on those days. The first (and the two were similar) was in the usual form of chattel mortgages, and, for the consideration of $346.62, conveyed to plaintiffs "all my stock of dry goods and groceries, notions, boots and shoes, book accounts, notes and merchandise of every description, now in my store in Knoxville, Marion County, Iowa, and to include all goods and merchandise which may hereafter be brought into said store," with the usual warranty of title, and to be void on condition that Hamilton should pay the plaintiffs three notes, dated July 4, 1882; one for $100, due September 4, 1882; one for $100, due October 4, 1882; and one for $104.62, due November 4, 1882, with interest. The mortgage further stipulated: "And I, the said George W. Hamilton, do hereby covenant and agree to and with the said Sperry, Watt & Garver that, in case of default made in the payment of the above promissory notes, or in case of my attempting to dispose of or remove from said county of Marion, the aforesaid goods and chattels, or any part thereof, or whenever the said mortgagee or his assigns shall choose so to do, then and in that case it shall be lawful for the said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods or chattels wherever found." Then followed the usual power of sale, a provision for attorney's fees in case the mortgage should be foreclosed by suit, and that if anything remained after paying plaintiffs' claim it should be returned to Hamilton. The other mortgage, executed the next day, was for $89.54, as evidenced by a promissory note for that amount, dated July 5 and due July 28, 1882, with interest. These claims of the mortgagees were for goods sold during the six months prior to the execu-

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tion of the mortgages. It appears that in the fore part of that year Hamilton had had a partner named Douglas, and the first mortgage was for goods bought by that firm; and the second for goods bought by Hamilton alone, after he had purchased Douglas's interest in the partnership. It is contended that these mortgages should be considered as executed simultaneously, and parts of one transaction, and as equivalent to a general assignment for the benefit of creditors, and that, having preferences in them, they are void under the state law respecting assignments. But this contention is clearly untenable. The instruments, on their faces, are mortgages given to secure debts not yet due. The mortgagor had no thought of closing out his business. He expected to continue in it, and hoped out of the profits thereof to pay this indebtedness coming due in the future. He had, on June 26, given a prior mortgage to secure another creditor; and on July 6, the day after the execution of the last mortgage in controversy, when another creditor demanded security, he declined to give it without including in the mortgage all his other creditors, and did execute such a mortgage. So that if we could ignore the form of the several instruments, the only one which by any pretence could be called an assignment for the benefit of creditors was the one executed on the 6th day of July, an instrument not contemplated at the time these mortgages were given, and one forced upon him by the subsequent demands of another creditor. Obviously these instruments were, in the intent of the parties, what upon their face they appear to be, simply conveyances for security — chattel mortgages.

The other contention is, that the court erred in refusing to give this instruction:

"1. If the jury find from the evidence that the mortgagor in the chattel mortgages in evidence in this case was left in possession of the stock of goods mortgaged, with no provision for the application of the entire proceed of sales to the payment of debts secured by the mortgages, but with the privilege, express or implied, of continuing the business of buying and selling as before the making of the mortgages and applying a portion of the proceeds of sale to his own use, then

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such mortgages are fraudulent and void in law as to creditors."

In its charge the court thus stated the question:

"The issue submitted to you is this: Were the mortgages of plaintiffs executed in good faith and for the purposes of securing a *bona fide* indebtedness due to them from George W. Hamilton at the time, or were the same executed by Hamilton and received by the plaintiffs for the purpose of defrauding creditors of George W. Hamilton."

It further instructed the jury that the insolvency of Hamilton, if proved, would not of itself avoid the mortgages; and that he had the right to prefer any of his creditors. And upon the question of fraud it gave this instruction:

"In determining the question of fraud in the execution of mortgages you should take into consideration all the evidence that has been introduced bearing upon that question. Fraud is never presumed, but must be proved by the party alleging the same, and in determining whether or not there was fraud in any transaction you should consider all the circumstances of the case, and while the debtor retaining possession or the fact of the insolvency of the mortgagor do not, as a matter of law, determine the transaction to be fraudulent, yet in determining the question of fact you may consider the insolvency of the mortgagor, if he was insolvent, the fact of his retaining possession of the goods mortgaged, if he did so retain them, and what agreement, if any, was made between the parties with reference to the disposition that should be made of the goods so in his possession; and from all the evidence and circumstances in the case you will determine whether the transactions between the plaintiffs and Hamilton were in good faith, or whether they were designed and intended by the parties to defraud the other creditors of Hamilton."

On the face of the instruments there is clearly no foundation for the instruction which was refused. There is no reservation of interest to the mortgagor. On the contrary, the express provision is that if he defaults in payment, if he attempts to dispose of or remove from the county the mortgaged property, or any part of it, and whenever the mortgagee

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shall see fit, the latter may take immediate possession. While from the fact that the property mortgaged is a stock of goods in a store, possession of which is left with the mortgagor, there may be an implication that sales at retail by him were contemplated; yet express authority is given to the mortgagee to take possession at the first sale, and before the maturity of any one of the secured notes. So that upon the face of the mortgages there is nothing to suggest or justify the instruction. The mortgagor was put upon the stand as a witness for the plaintiffs in error, and testified as follows: "At the time I executed the first mortgage to Sperry, Watt & Garver it was understood between Mr. Ayers" (he being the attorney of the mortgagees) "and me that I was to go on selling goods in the ordinary way, and that I would be able to pay out. I was to use the money received from the sale of goods and use some of the money to buy goods, and I was to pay out of the proceeds the running expenses of the establishment and to take out whatever was needed for the support of myself and family, and to use the money in buying goods as I saw proper in carrying on the business, filling up the stock, and all that, and the money deposited in the bank that I did not need for the other purpose was to be applied on the payment of the debt." This testimony was repeated by him in different words, but disclosing no additional facts; and it is upon this statement of the understanding between him and the attorney of the mortgagees that this instruction was based. He did not in fact use any of the proceeds of the sales made by him for his own support, although his possession was not disturbed by the attachment until after the 13th of August, 1882, but used the entire proceeds in buying some additional goods for the store and in paying his debts. Perhaps this is only material on the question of good faith, and does not detract from the damaging effect, if any there be, of the understanding between the parties at the time of the execution of the mortgage. So the question is presented, whether, as a matter of law, a mortgage given by a merchant on his stock of goods to secure debts not yet due, which upon its face has no imperfections, contains no reservations for the benefit of the mortgagor, and is appar-

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ently only for the security of the mortgagee, and gives him full power to take possession on default in payment, or on any misconduct of the mortgagor, or whenever he pleases, is invalidated by the fact of a parol understanding, at the time of its execution, that the mortgagor may use the proceeds of his daily sales to support himself, and to keep up the stock by purchases, applying only the surplus, but all of that, to the payment of the mortgage debt; or whether such an understanding is simply to be taken into consideration, together with the other circumstances, as bearing upon the question of the good faith of the parties. The contention of the plaintiff in error is in support of the first alternative of this question, and he relies mainly on the cases of *Bank of Leavenworth* v. *Hunt*, 11 Wall. 391; *Robinson* v. *Elliott*, 22 Wall. 513, and *Means* v. *Dowd*, 128 U. S. 273. While there are some points of similarity between each of those cases and this, and while there are observations in the opinions filed in them pertinent and correct with reference to the special facts which, if disconnected from those facts and applied here, might seem authoritative, yet there are clear and sufficient reasons why neither the decisions nor the opinions should control this case. In *Bank of Leavenworth* v. *Hunt*, the validity of a chattel mortgage was in question. But it had not been filed in the office of the register of deeds, as required by the statutes of Kansas, and under those statutes was, therefore, void as against creditors. It was said in the opinion that it was void for another reason, and that was, that the mortgagors were permitted to remain in possession and to continue to sell the goods as before the mortgage. But as appears from the statement of facts, these sales were not made with a view of appropriating the surplus proceeds to the payment of the mortgage debt, but for the sole benefit of the mortgagors.

In *Robinson* v. *Elliott*, a case coming from Indiana, the objection to the chattel mortgage appeared on the face of the instrument, in that it permitted the mortgagor not only to retain possession, but to sell and buy as theretofore, with no stipulation for the application of the surplus proceeds to the payment of the mortgage debt, the only stipulation being that

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the purchased goods should come within the lien of the mortgage. Apparently this retained power of sale by the mortgagor was in no respect for the benefit of the mortgagee, but to enable the mortgagor to continue in business in defiance of his unsecured creditors, protected by the lien of this mortgage. The conduct of the parties after the mortgage was in harmony with this apparent intent, and removed any uncertainty as to the scope and purpose of the instrument. It was not intended by that decision to hold that a chattel mortgage was void because it provided for a retention of possession by the mortgagor, and a sale by him. On the contrary, Mr. Justice Davis, delivering the opinion of the court, carefully used this language: "We are not prepared to say that a mortgage under the Indiana statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors. But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit."

The instrument considered in *Means* v. *Dowd* was regarded by this court more in the nature of an assignment for the benefit of creditors than as a chattel mortgage; and the same elements were discovered in that instrument, and in the subsequent conduct of the parties, as appeared in the case in 22 Wall. In neither of those cases is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that either in the mortgage, or by parol agreement between the parties, the mortgagor is to retain possession, with

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the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee. What was meant was, that such an instrument should not be used to enable the mortgagor to continue in business as theretofore, with full control of the property and business, and appropriating to himself the benefits thereof, and all the while holding the instrument as a shield against the attacks of unsecured creditors. Neither was it suggested in either of those cases that this court, in determining the validity of a chattel mortgage, would ignore the settled law of the State in which the transaction took place, as established by the decisions of its highest court. On the contrary, there was an intimation that this court would respect such decisions. In the opinion in *Robinson* v. *Elliott*, this court said there had been no decision of the question by the Supreme Court of the State, — though as to the present state of the law see *Morris* v. *Stern*, 80 Indiana, 227; *McFadden* v. *Fritz*, 90 Indiana, 590; *Fisher* v. *Syfers*, 109 Indiana, 514; *Muncie National Bank* v. *Brown*, 112 Indiana, 474; *New* v. *Sailors*, 114 Indiana, 407, and *Mayer* v. *Feig*, 114 Indiana, 577, — but noticed some intimations and citations in one of its opinions which it was thought tended to support the conclusion reached. And the opinion in *Means* v. *Dowd*, not only noticed this intimation in the former case, but expressly referred to the law as established in North Carolina, that being the State in which the transaction took place. Further, in the case of *People's Savings Bank* v. *Bates*, 120 U. S. 556, 561, a case coming from the State of Michigan, and involving the question of the validity of a chattel mortgage, Mr. Justice Harlan, delivering the opinion of the court, referred to the law of the State as controlling. He said: "In behalf of the bank it is contended that the mortgage to Bates, Reed, & Cooley was fraudulent as against subsequent creditors and mortgagees in good faith, in that the mortgagees contemplated that the mortgagors should remain in possession and prosecute the business in the ordinary mode. . . . If the mortgage had, in terms, made provision for such a course upon the part

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of the mortgagors, as the bank contends was in the contemplation of the mortgagees, it would not be held, as a matter of law, to be absolutely void or fraudulent as to other creditors. *Oliver* v. *Eaton*, 7 Michigan, 108, 112; *Gay* v. *Bidwell*, 7 Michigan, 519, 523; *People* v. *Bristol*, 35 Michigan, 28, 32; *Wingler* v. *Sibley*, 35 Michigan, 231; *Robinson* v. *Elliott*, 22 Wall. 513, 523. The good faith of such transactions, where they are not void upon their face, is, under the statutes of Michigan, a question of fact for the determination of the jury. *Oliver* v. *Eaton* and *Gay* v. *Bidwell*." See also *Allen* v. *Massey*, 17 Wall. 351. While in the foregoing quotation reference is made only to the statutes of the State, the law is as fully established by repeated decisions of its Supreme Court as by the express language of its statutes. This decision not only gives countenance to the ruling of the trial court in this case, but also warrants an examination of the settled law of the State, as evidenced by the decisions of its highest court. In respect to the latter there can be no doubt. Independently of the ruling in this case, see *Torbert* v. *Hayden*, 11 Iowa, 435; *Hughes* v. *Cory*, 20 Iowa, 399; *Meyer* v. *Gage*, 65 Iowa, 606; and *Meyer* v. *Evans*, 66 Iowa, 179. In the first of those cases, it appeared that the mortgagors, with the knowledge of the mortgagee, remained in possession, and sold in the ordinary course of business about a thousand dollars' worth of goods, the proceeds of which were applied to their support and the rent and expenses of the store; and the transaction, having been found to have been in good faith, was sustained, and the mortgage adjudged valid. This decision was in 1861.

In the second case, decided in 1866, the mortgage on its face reserved the right to sell, in the usual course of business, and to add to the stock by the purchase of other goods, with the stipulation that thirty-three per cent of the sale should be applied on the mortgage debt; and in an elaborate opinion by Judge Dillon, the mortgage was sustained.

In the third case, decided in 1885, there was simply a reservation of possession, with the right to sell at retail, and in respect thereto the court summed up the law of the State in these words: "And the uniform holding of this court has

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been that the reservation by the mortgagor of the right to retain possession of the property, and sell it in the ordinary course of business, does not render the mortgage fraudulent in law. See *Torbert* v. *Hayden*, 11 Iowa, 435; *Hughes* v. *Cory*, 20 Iowa, 399; *Clark* v. *Hyman*, 55 Iowa, 14; *Sperry* v. *Etheridge*, 63 Iowa, 543; *Jaffray* v. *Greenbaum*, 64 Iowa, 492. This holding is based upon the construction given to certain statutes of the State, and it has been adhered to for more than twenty years, and has become a rule of property in the State, and we see no occasion now for departing from the rule that has been thus established."

And in the last case, by the terms of the instrument, there was reserved a right to sell at retail, in the ordinary course of trade; and there was, besides, a parol understanding that the mortgagor should keep up the stock and pay the expenses out of the proceeds of the business; and there was no provision in the mortgage, and no agreement, that the surplus proceeds should be applied on the debt, but by the terms of the mortgage the mortgagee had the right at any time to take possession of the property, and sell the same for the satisfaction of his debt. And it was held that the mortgage was not invalidated thereby, but that its validity depended on the good faith of the parties to the transaction.

From these decisions and others running through a period of thirty years, there can be no doubt as to the settled law of the State; and as to the law established, as was said by the Supreme Court, in *Meyer* v. *Gage*, *supra*, mainly at least from a construction of the state statutes. Can such a settled construction be ignored by this court, and the judgment of the highest court of the State be reversed on error in a matter depending partially at least upon the construction of state statutes? It would be strange, indeed, if this court should adjudge that there was error on the part of the Supreme Court of a State in following its own rulings, uniform and undisturbed for a quarter of a century. The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each State has a right to determine for itself under what circumstances they may be executed,

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the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several States; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each State as decisive in respect to any case arising therein. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223. Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought, whether the rulings made by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. The law now generally requires a record of all such instruments, and that, like the recording of a real estate mortgage, gives notice to all parties interested of the fact and extent of incumbrances. Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional, sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right, or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking of possession by a creditor results in closing the business, and turning the debtor out of employment. The only parties who can claim to be injuriously affected are unsecured creditors. But they are notified by the record of the exact relations between the mortgagor and mortgagee;

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and surely subsequent creditors have no right to complain if they deal with the mortgagor with full knowledge of such relations. Existing creditors may of course challenge the good faith of the transaction, but if they cannot disturb an absolute sale when made in good faith, why should they be permitted to challenge a conditional sale if made in like good faith? The fact that fraudulent relations are possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one, unaffected by any settled law of the State, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith, and that the decision of the Supreme Court of Iowa rests on sound principles. *Jewell* v. *Knight*, 123 U. S. 426; *Smith* v. *Craft*, 123 U. S. 436. Reference may also be made to the opinion of Mr. Justice Bradley, of this court, holding the Circuit Court in the Western District of Texas, *Barron* v. *Morris*, 14 Nat. Bank. Reg. 371, and the opinion of Mr. Justice Strong in the Circuit Court in New Jersey, in *Miller* v. *Jones*, 15 Nat. Bank. Reg. 150.

We see no error in the decision of the Supreme Court of Iowa, and it is *Affirmed.*

UNITED STATES *v.* BREWER.

CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 1178. Argued and submitted March 13, 1891.—Decided March 23, 1891.

Sections 1067, 1068 and 1070 of the Code of Tennessee of 1884, by Milliken & Vertrees do not require that, after an election, the ballot-box shall be opened at the place where the election was held, and the names of the persons appearing in each ballot be read aloud at that place, and the ballot-box not be removed from that place before the votes are counted, so as to make an indictment good, under § 5515 of the Revised Statutes of the United States, relating to an election at which a Representative or Delegate in Congress is voted for, which alleges, as a neglect or refusal to perform a duty, required of the officer of an election, by a law

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of a State, and as a violation of a duty imposed by such law, a failure to open the ballot-box at that place, and a failure to read aloud such names at that place, and the removing of the ballot-box from that place before the votes were counted, no fraud being averred in the indictment, and no intent to affect the election or its result, and there being no allegation that the election or its result was affected.

Two questions in a certificate of division in a criminal case were not answered, because they were too general, one being whether a demurrer to an indictment ought to be sustained, and the other being whether the matters alleged in the indictment constituted an offence under the statute of the United States.

A question was not answered, because the answers to other questions disposed of the case.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff. *Mr. Attorney General* was on the brief.

Mr. Julius A. Taylor for defendants submitted on his brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an indictment against three persons, found in the Circuit Court of the United States for the Western District of Tennessee, under section 5515 of the Revised Statutes.

That section, with its punctuation, as published in the second edition of the Revised Statutes, is as follows: "SEC. 5515. Every officer of an election at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate; or who withholds, conceals or destroys any certificate of record so

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required by law respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and eleven."

It purports to be a reënactment of section 22 of the act of May 31, 1870, ch. 114, (16 Stat. 145,) which, with its punctuation, as published, was as follows: "SEC. 22. *And be it further enacted*, That any officer of any election at which any representative or delegate in the Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election, or the result thereof; or fraudulently make any false certificate of the result of such election in regard to such representative or delegate; or withhold, conceal or destroy any certificate of record so required by law respecting, concerning or pertaining to the election of any such representative or delegate; or neglect or refuse to make and return the same as so required by law; or aid, counsel, procure or advise any voter, person or officer to do any act by this or any of the preceding sections made a crime; or to omit to do any duty the omission of which is by this or any of said sections made a crime, or attempt to do so, shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor, as provided in the nineteenth section of this act for persons guilty of any of the crimes therein specified."

The indictment originally contained four counts. The first count alleged that on the 6th of November, 1888, in the county of Shelby, Tennessee, at the third ward of Memphis,

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an election for a Representative in the Congress of the United States for the Tenth Congressional District of Tennessee was held, at the southeast corner of Gayoso and Second Streets, Memphis, in the fourteenth civil district of that county; that at that election two of the defendants were the judges thereof and the other was the returning officer thereof, holding the election, "at which election such representative in Congress was then and there voted for; that it then and there thereby became and was the luty (among others) of the said judges and returning officer of said election, when the same was finished and after the polls were closed, then and there at the said place of holding the same, and at the place where the ballots were cast at said election, to open the ballot-box then and there used at said election and then and there containing the ballots cast at said election, in the presence of such of the electors at said election as might choose to attend, and to read aloud the names of the persons which should appear in each ballot in the said ballot-box so cast at said election;" and that the defendants did then and there "unlawfully neglect to perform their said duty in regard to the said election, as required of them by law, by then and there, and after the said election was finished, and after the polls at said election were closed, and before the counting of the votes cast at said election, failing to so open the said ballot-box at the place where the said election was held, and to so then and there at the place last aforesaid read aloud the names of the persons which should then and there appear in each ballot in the said ballot-box, the same being the duly designated place of holding the said election."

The second count, with the same preliminary allegations as in the first count, averred that the defendants unlawfully refused to perform their said duty, by failing to do what it was alleged in the first count they failed to do, "and by then and there, and after the said election was finished and the polls thereof were closed, unlawfully removing the said ballot-box from the place where the said election was held, and before the counting of the votes cast at the said election, the same being the duly designated place of holding the said election."

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The third count, after making the same preliminary allegations, averred that the defendants did unlawfully violate their said duty by failing to do what it was alleged in the first and second counts they failed to do, and by unlawfully removing the ballot-box as averred in the second count.

The fourth count averred that the defendants did "unlawfully and knowingly, and with intent to affect the said election and the result thereof, and after the said election was finished, and after the polls at said election were closed, and before the counting of the votes cast at said election, remove the ballot-box used at said election, and then and there containing the ballots cast at said election, from the place aforesaid where the said election was held, the same being the duly designated place of holding the said election, such removal of the said ballot-box being unauthorized by law, and contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America."

The indictment is based on the view that certain sections of the statutes of Tennessee must be so construed as to require that the ballot-box shall not be removed from the place where the election was held, before the votes cast are counted, and that they shall be counted at the place where the election was held, immediately after the closing of the polls.

The defendants being brought into court, a *nolle prosequi* as to the fourth count was entered, on motion of the district attorney. The defendants demurred to the other three counts, setting forth the following grounds of demurrer:

"1. Because the matters and things stated and set forth in said three counts, in manner and form as therein contained, do not constitute offences against the laws of the United States and do not come within the purview, true intent and meaning of section 5515 of the Revised Statutes of the United States, nor of any act of the Congress of the United States of America.

"2. Because there was no duty imposed by the laws of the State of Tennessee, or by the laws of the United States, or otherwise, (as stated and set forth in each of said three counts

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of said indictment,) upon these defendants, as 'said judges and returning officer of said election, when the same was finished and after the polls were closed, then and there, and at the place of holding the same, and at the place where the ballots were cast at the said election, to open the ballot-box then and there used at said election,' in manner and form as the said duty is alleged in said three counts.

"3. Because the first count of said indictment and the matters and things therein contained, in the manner and form as the same are therein stated and set forth, do not allege any crime or offence against the laws of the United States, or a neglect to perform any duty imposed by the laws of the State of Tennessee, or otherwise, upon these defendants, as returning officer and judges of the said election.

"4. Because the matters and things contained in the second count of said indictment, in manner and form as the same are therein stated and set forth, do not allege the refusal to perform any duty imposed by the laws of the State of Tennessee, or otherwise, upon these defendants, as judges and returning officer of the said election.

"5. Because the matters and things contained in the third count of said indictment, in manner and form as the same are therein stated and set forth, do not allege the violation of any duty imposed by the laws of the State of Tennessee, or otherwise, upon these defendants, as returning officer and judges of the said election.

"6. Because neither the laws of the State of Tennessee nor the laws of the United States made it the duty of these defendants, as returning officer and judges of the said election, 'when the same was finished and after the polls were closed,' to open the ballot-box then and there used at the said election 'at the said place of holding the same and at the place where the ballots were cast at said election,' in manner and form as such duty is stated and set forth in each of said three counts of said indictment.

"7. Because a removal of the ballot-box used at said election 'from the place where said election was held, and before the counting of the votes cast at said election,' as alleged

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against these defendants in the second count of said indictment, was not in law a refusal by these defendants, as such returning officer and judges, to perform any duty imposed upon them by the laws of the State of Tennessee or of the United States, or otherwise, in manner and form as such duty is stated and set forth in said second count of the said indictment.

"8. Because the removing by these defendants, as alleged in the third count of the said indictment, of the ballot-box, 'from the place where said election was held and before the counting of the votes cast at said election, the same being the duly designated place of holding said election,' was in violation of no duty imposed by the laws of the State of Tennessee, or of the United States, or otherwise, upon these defendants, as such returning officer and judges, as such duty is stated and set forth in the said third count of said indictment.

"9. Because there is no allegation in any of the first three counts of said indictment of an intent on the part of these defendants, or any or either of them, to affect the said election or the result thereof.

"10. Because, as the duty stated and set forth in each of the first three counts of said indictment was not imposed by any law of the State of Tennessee, or of the United States, or otherwise, upon the defendants, as such judges and returning officer, the matters and things in said three counts in manner and form as therein contained do not constitute offences against the provisions of section 5515 of the Revised Statutes of the United States, nor of any law of the United States, there being in no one of said counts, any allegation of an intent on the part of these defendants to affect the said election or the result thereof."

There was a joinder in the demurrer, and it was argued before the court, held by the Circuit Judge and the District Judge. They were divided in opinion on the questions raised by the demurrer, and certified to this court the points upon which they disagreed, as follows:

"1. Whether the said demurrer, so filed, to the first three counts of the indictment aforesaid, ought to be sustained.

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"2. Whether the matters and things alleged and set forth in the first three counts of said indictment constitute an offence or offences under section 5515 of the Revised Statutes of the United States, or under any other law or statute of the United States.

"3. Whether the laws of the State of Tennessee imposed upon said defendants, as such returning officer and judges of election, at the said election, the duty, when the election was finished and after the polls were closed, of opening the ballot-box used at the said election, at the place of holding the same, to wit, at the place where the ballots of said election were cast.

"4. Whether, under the laws of the State of Tennessee, it was a violation of duty imposed upon the defendants, as such judges and officer of election, at the said election, for said defendants, when the said election was finished and after the polls were closed, to remove the ballot-box used at said election from the place where the same was held, and where the ballots were cast at said election, to another place, for the purpose of opening the said ballot-box and reading aloud the names of the persons appearing on each ballot, as contemplated by section 1068 of the Code of Tennessee, (Milliken & Vertrees' edition).

"5. Whether it was the duty, under the laws of the State of Tennessee, of the said defendants, as judges and officer of the said election, after the same was finished and after the polls at said election were closed, to open the ballot-box used at said election, to wit, at the southeast corner of Gayoso and Second Streets, in Memphis, Tennessee, the same being the duly designated place of holding said election, and the place where said election was held, and to there read aloud the names of the persons appearing on each ballot cast at said election, as contemplated by said section 1068 of the Code of Tennessee.

"6. Whether it was a violation of duty imposed by the laws of the State of Tennessee upon the defendants as judges and officer of said election, when the same was finished, and after the polls at said election were closed, and before the counting

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of the votes cast at said election, to remove the said ballot-box from the southeast corner of Gayoso and Second Streets, in Memphis, Tennessee, that being the designated place of holding said election and the place where the same was held, for the purpose of opening the said ballot-box and reading aloud the names of the persons appearing on each ballot cast at said election, as contemplated by said section 1068 of the Code of Tennessee.

"7. Whether it was a neglect or refusal of duty imposed by the laws of the State of Tennessee upon the defendants, as judges and officer of the said election, when the same was finished, and after the polls at said election were closed, and before the counting of the votes cast at said election, to fail to open the ballot-box used at said election at the southeast corner of Gayoso and Second streets, in Memphis, Tennessee, that being the duly designated place of holding said election, and the place where the same was held, and to there read aloud the names of the persons appearing on each ballot cast at said election, as contemplated by said section 1068 of said Code of Tennessee.

"8. Whether the first three counts of said indictment, or any of them, are bad because no one of the said counts contains an allegation that the matters and things therein respectively charged and set forth against said defendants, as judges and officer of the election aforesaid, were so done by them with intent to affect the said election and the result thereof."

The first two questions certified are in such a general form that this court cannot answer them, as has been repeatedly held. *United States* v. *Northway*, 120 U. S. 327; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510, 514; *United States* v. *Hall*, 131 U. S. 50; *United States* v. *Lacher*, 134 U. S. 624, 632.

As to questions 3, 4, 5, 6 and 7, we are of opinion that they must be answered in the negative.

The statutes of Tennessee which relate particularly to the question involved are sections 1067, 1068 and 1070 of the Code of Tennessee of 1884, by Milliken & Vertrees, which are as follows: "Sec. 1067. The officer or person and judges ap-

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pointed to hold an election shall not proceed to or commence counting out the votes given in the election until the polls shall have been closed. Sec. 1068. When the election is finished, the returning officer and judges shall, in the presence of such of the electors as may choose to attend, open the box and read aloud the names of the persons which shall appear in each ballot; and the clerks, at the same time, shall number the ballots, each clerk separately." "Sec. 1070. The inspectors have authority to maintain regularity and order in the balloting; to keep access to the polls free and unobstructed; to prevent all disorderly and riotous conduct during the election, and during the counting of the votes after the polls are closed; and for this purpose they are vested with all the powers of a peace officer."

It is contended that these sections impliedly require that the box shall be opened, and the names of the persons appearing in each ballot read aloud, at the place where the election was held, and that the ballot-box shall not be removed from the place where the election was held before the votes are counted. But this is urged merely as an implication. The statute does not provide distinctly and specifically, and in words required in a criminal statute, that the box shall be opened at the place where the election was held, and the names of the persons appearing in each ballot be read aloud at that place, and the ballot-box not be removed from that place before the votes cast are counted.

We are not referred to any statute of Tennessee, or to any construction given by its courts to the sections of the statute above referred to, which declares it to be the duty of the officers of election to count the votes at the place where the election was held. The implication of the decision in *McCraw* v. *Harralson*, (4 Coldwell, 34, 44, 45,) made in 1867, is to the contrary. In that case, section 864 of 1 Thompson & Steger's Statutes of 1871, which section was enacted in 1835, provided that "the officer or person holding any election of county officers shall compare the polls at the court-house, on the first Monday after said election, and shall deliver to each person elected a certificate of his election." The officers holding the

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election in controversy did not compare the polls at the court-house, but counted the votes in a private house in the town in which the court-house was situated; and the court held that, the returns having been made to the court-house, and the county court being in session, the counting of the votes at a private house in the town was a sufficient compliance with the requirements of the statute, and constituted no ground, in the absence of all fraud or misconduct in comparing the polls and counting the votes, for setting aside the election.

Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Sharp*, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States* v. *Lacher*, 134 U. S. 624, 628. We are of opinion, therefore, that questions 3, 4, 5, 6 and 7 must be answered in the negative, no fraud being averred in the indictment, and no intent to affect the election or its result, and there being no allegation that the election or its result was affected.

This disposition of questions 3, 4, 5, 6 and 7 requires that the demurrer to the indictment be sustained, and makes it unnecessary to answer question 8.

Questions 1 and 2 are not answered because they are too general. Questions 3, 4, 5, 6 and 7 are answered in the negative, and question 8 is not answered because it is unnecessary to answer it.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *v.* FRAZIER.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 1407. Submitted March 9, 1891. — Decided March 23, 1891.

When the pleadings in the trial court of a State, the assignment of error in the Supreme Court of the State, the opinion of the latter court and its original decree present no federal question, and two days later on

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motion of counsel the decree is modified so as to show that a federal question was presented by counsel and decided adversely to their contention, there is color for a motion to dismiss for want of jurisdiction here.

When a charter power is once fully exercised by a corporation, and exhausted, it is, in respect of further contracts and rights of the corporation, as if it had never been granted.

The plaintiff in error having exhausted the power to mortgage its property given by the act of 1847, before its property was mortgaged in 1881, the latter mortgage was made under the then existing laws of Tennessee.

MOTION to dismiss or affirm. The case is stated in the opinion.

Mr. Henry H. Ingersoll for the motion.

Mr. William M. Baxter opposing.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is submitted on a motion to dismiss or affirm. The facts are these:

The State of Tennessee in 1847 (Acts of 1847–48, page 195) granted a charter of incorporation to the East Tennessee and Virginia Railroad Company. In 1869, this corporation was consolidated with the East Tennessee and Georgia Railroad Company, under the name of the East Tennessee, Virginia and Georgia Railroad Company. This consolidated company, in 1881, executed a mortgage, which in 1886 was foreclosed, and the plaintiff in error, the East Tennessee, Virginia and Georgia Railway Company, as purchaser, took possession of the franchises and property. After this foreclosure and sale, petitions in the nature of creditor's bills were filed in behalf of the defendants in error, judgment creditors of the railroad company, to subject its property in the hands of the purchaser, the railway company, to the satisfaction of their judgments. These judgments were, in point of time, subsequent to the mortgage of 1881, and the question presented was, whether they were superior liens. Such superiority was claimed under and by virtue of a proviso to section 3, of chapter 72 of the Laws of Tennessee of 1877, page 92, which reads: "And pro-

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vided further, that no railroad company shall have power under this act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom for timber furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this State." By final decree of the chancery court, approved by the Supreme Court of the State, priority of lien was given to the appellees' judgments, and satisfaction decreed out of the property. Of this adjudication of priority, plaintiff in error complains, and presents as a federal question the proposition that the act of 1877, giving priority to certain judgments over mortgage liens, was an impairment of the contractual rights created by the act of 1847. The 15th section of that act contained this provision: "The said company may at any time increase its capital to a sum sufficient to complete the said road, and to stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works." And the contention is, that this section granted the right to create an absolute first lien by mortgage, which could not be taken away by subsequent statutes giving priority to any judgments or claims of date later than the mortgage. The claim that the act of 1877 was in impairment of contractual rights given by a prior act of the legislature, applicable to the corporation mortgagor, presents doubtless a federal question; and the first matter for our consideration is, whether there was color for the motion to dismiss. It appears that in the pleadings filed by the railway corporation, responsive to the petitions of the appellees, the unconstitutionalty of the act of 1877 was alleged; but such unconstitutionality was not predicated on any provision of the United States Constitution, but solely on those of the constitution of the State. We quote from the answer to one of the petitions, which, in this respect, is as full and complete as any:

"Respondent is advised and will insist that the act of 1877,

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under which petitioners seek to pursue and appropriate respondent's property to the payment of their claims, and especially the provision of the 3d section of said act, is unconstitutional and void, because said act embraces more than one subject, and the proviso in section 3 aforesaid and the subject of said proviso is not expressed in the title of said act, and because said act is not in compliance with article 2, section 17, of the constitution of this State. And therefore petitioners have no warrant of law for asking satisfaction of their claims from the property mentioned in the original bill."

So upon the pleadings no federal question was presented. Not only that, but in the assignment of error, which was made when the case was taken to the Supreme Court of the State, no reference was made to any federal question; and the unconstitutionality of the act was rested solely upon its supposed conflict with the state constitution. Further, in the opinion of the Supreme Court of the State, reported in 88 Tennessee, 138, which is an elaborate and careful discussion of the questions in the case, the alleged conflict between the act and the state constitution is fully noticed; but nothing is said about any supposed infringement of the federal Constitution. When on October 26, 1889, the decree of the Supreme Court was entered, affirming the ruling of the chancellor as to the liability of the property, the points decided were specifically stated in it, and in them no reference is made to any federal question. Two days thereafter an entry appears on the records of that court, stating that upon application of counsel for the railway company the decree is modified so as to show that upon the argument of the case the question of the invalidity of the act of 1877, by reason of the inhibition of the Federal Constitution, was presented by counsel, and that the decision of the court was adverse to such contention. Upon these facts, we think there was color for the motion to dismiss. The pleadings in the trial court, the assignment of error, the opinion of the Supreme Court and the original decree of that court, contain no reference to any federal question. The invalidity of the act of 1877, in all these proceedings, is placed upon a supposed conflict with the state constitution. Obvi-

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ously that was the substantial matter litigated. The fact that two days after the decision the presentation of a federal question was recognized by the Supreme Court, is not to be taken as a declaration that the federal question was a principal one — one which it had theretofore ignored — but rather implies that it was a subordinate and incidental matter, which, though noticed by counsel, was not made the stress of the argument or the burden of complaint. As such a claim had been made, although in a subordinate and incidental way, and although it was a matter which had not arrested its attention, that court, with a delicate sense of justice, caused a statement to be entered of the presentation of this federal question, in order that any rights of review which the railway company might have by reason thereof should not be lost to it. Recognizing the fact that thereby a federal question is presented, it seems so obvious that it was not the bone of contention, the principal matter litigated, but only put into the record for the purpose of an appeal, that it must be adjudged there was color for the motion to dismiss. While that motion must be denied, the motion to affirm is presented for consideration, and upon that we have no doubt.

Whatever special rights of mortgage were given by the act of 1847 were exhausted. That special right was to increase its capital by the issue of bonds secured by mortgage to a sum sufficient to complete its road, and stock it with everything to give it full operation. It appears that the road authorized by this charter was completed, equipped and in full operation more than twenty-five years before the mortgage of 1881 and long before the consolidation of 1869. Of course when a charter power is once exhausted it is, in respect to further contracts and rights, as though it had never been granted. So, in 1881, when the railroad company executed its mortgage, it was not by virtue of this special grant of power, but by virtue of the general power given by subsequent statutes, and the exercise of such general power must be held subordinate to the terms accompanying its grant. Neither is it of any significance that by legislation prior to 1877 a general power to mortgage had been given to railroad corporations. Until a

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general power granted to corporations has been exercised, the terms and conditions under which it may be exercised are subject to legislative control. It may change or modify them as it sees fit, and the law in force at the time the mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage. That law in this case was the law of 1877, which subordinated the mortgage to the lien of subsequent judgments, for claims of the nature of those held by appellees.

We see no error in the ruling of the Supreme Court of Tennessee, and it is therefore

Affirmed.

WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY v. SKINNER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 1235. Submitted March 9, 1891. — Decided March 23, 1891.

In determining the ground upon which a judgment in a state court was rendered, this court may refer to the opinion of that court.

When it does not appear upon what ground the highest court of a State placed its judgment, and the judgment may be supported without deciding a federal question, this court is without jurisdiction of it in error.

THIS action was originally brought in the Supreme Court of the State of New York by Skinner, the defendant in error, for a breach of contract on the part of defendant (plaintiff in error,) in refusing to account and pay for the use of a certain patented invention, known as an improvement in oil-hole covers for journals, described in letters patent No. 124,092, and reissue of the same, No. 10,064. The case was referred to a referee, who found substantially the following facts in his report:

1st. That the plaintiff and defendant entered into an agreement whereby it was agreed on the part of the plaintiff that defendant should have the exclusive right of using plaintiff's

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oiler on mowing and reaping machines, and should have the right, but not exclusive, to use it on other machines; and on the part of the defendant, that it would use the oiler on its mowing and reaping machines, and would pay the plaintiff the reasonable value of such use. 2d. That defendant proceeded to make and apply to its mowing and reaping machines a device exactly similar to the plaintiff's oiler, except that in the plaintiff's oiler the periphery of the conical head of the spring plug was scalloped, while in the device made and applied to such machines by the defendant such periphery was circular and not scalloped. 3d. That the defendant's oiler was a mechanical equivalent for the plaintiff's oiler. 4th. That prior to any invention by the plaintiff, an oiler was illustrated and described in Webster's Dictionary, edition of 1869, substantially similar to defendant's oiler, and was represented as fitted to perform the same functions, and in substantially the same way. 5th. That the said making and application of defendant's oiler was so done in pursuance of the license obtained from the plaintiff by virtue of such agreement, and was in fact a use of plaintiff's oiler under such license. 6th. That the value for such use was 5 cents for each of 233,081 machines upon which it was applied. Judgment having been entered upon the finding of the referee, an appeal was taken to the court in general term, by which an opinion was rendered and filed affirming the judgment. An appeal was then taken to the Court of Appeals, by which the judgment was again affirmed, no opinion having been delivered or filed. Thereupon the defendant sued out a writ of error from this court, assigning as error, first, That the claim of the patent, upon which plaintiff sought to recover royalties, was limited to a conical-headed and *scalloped* spring plug, and that the patent particularly set forth the scalloping of the conical head, the defect in the device improved upon, and how the same was obviated by such scalloping; and that the said courts erred in holding that the claim was not for a scalloped head, but for the combination, with other elements, of a conical head, whether the same was or was not scalloped. Second. That the referee found that the defendant promised to pay the

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plaintiff the reasonable value of the patented device, and also found that if the claim for the patent was for nothing more than a scalloped conical head, in combination with other elements, the same was worthless, and that plaintiff ought not to recover; and that said courts erred in holding that, because the claim was substantially for a conical head, whether said head was or was not scalloped, defendant was liable for more than nominal damages. Third. That the state courts also erred in their conclusion that defendant had actually used plaintiff's invention, it being found by the referee that defendant had not used such device, unless the claim of the patent was for a conical-headed spring plug, with or without scallops. Fourth. That such holdings were an erroneous construction of the letters patent, and necessarily involved the legal effect of the patent laws of the United States.

A motion was thereupon made by the defendant in error to dismiss for want of jurisdiction, coupled with a motion to affirm.

Mr. James Lansing for the motion.

Mr. Ezek Cowen opposing.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

It is well settled by a long series of adjudications that, to give this court jurisdiction by writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *DeSaussure* v. *Gaillard*, 127 U. S. 216.

Now, while the trial court appears to have held the defendant liable upon the ground that it had agreed to use the plaintiff's device upon all of its machines, and also upon the ground that it had in fact used them, or their mechanical equivalent, it is very evident from an examination of the opinion of the

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general term, which we are at liberty to consult, *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, that neither the construction nor the validity of the plaintiff's patent was regarded as material. That court found the agreement on the part of the defendant to be that, in consideration of the right to the exclusive use of the plaintiff's device, it would use it upon all mowing and reaping machines, and would pay a reasonable value for such use. "By the terms of the agreement," said the court, "it was not incumbent upon the plaintiff to show that the defendant did actually use it upon such machines. It was sufficient for him to show the number manufactured during the existence of the agreement. Neither can the defendant evade liability by proving that it did not use it, because his agreement was, in effect, that he would pay a reasonable value for its use upon all mowing and reaping machines manufactured, and it cannot now be permitted to escape payment, as provided by the agreement, by proof that, without the knowledge of the plaintiff, it omitted to place the attachment upon machines manufactured by it. . . . The views thus expressed render it unnecessary to consider the question discussed by the referee, as to whether or not the defendant did use plaintiff's device upon its machines." Under this view, the only question of fact was the value of the use of the device, which the referee fixed at five cents, and his finding upon that point is conclusive.

The defence to the case was that the defendant did not make use of the plaintiff's spring plug, which had a scalloped head, but did make use of an oiler shown in Webster's Dictionary, which was practically the same, except that it did not have a scalloped head, its contention being that the scalloping of the head was immaterial and useless, and that the device so far as it was useful had been anticipated. But the referee found that, by accepting the license and agreeing to use the plaintiff's patented device, the defendant was estopped to deny the validity of the patent to the full extent of its claim, and if, as he found, the defendant made use of the device set forth in the claim of the patent, or its mechanical equivalent, it was liable, though in an action for infringement of such claim, it

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might have been adjudged invalid. But, as before stated, the general term found it unnecessary to determine whether the defendant had actually made use of the device or its equivalent, and held it to be liable upon the ground that it had agreed to use it upon all its machines, and was, therefore, bound to pay its value as fixed by the referee.

It does not appear upon what ground the Court of Appeals proceeded in affirming this judgment, but as the case might properly have been determined upon a ground broad enough to support the judgment without resort to a federal question, this court has no jurisdiction. *Beaupré* v. *Noyes*, 138 U. S. 397; *Johnson* v. *Risk*, 137 U. S. 300.

The writ of error must, therefore, be dismissed for want of jurisdiction.

MUTUAL RESERVE FUND LIFE ASSOCIATION v. HAMLIN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

No. 184. Argued March 2, 3, 1891. — Decided March 23, 1891.

The plaintiff in error was an association formed "to furnish substantial aid to their families or assigns in the event of a member's death." The husband of the defendant in error became a member, and received a certificate stating that in consideration, among other things, "of the payment of all dues and of all mortuary assessments" his wife should be entitled to receive $10,000 from the death fund of the association. The constitution and by-laws of the association provided that a mortuary assessment should be made on the first days of February, May, August and November, but did not fix any rate; that it should be the duty of a member failing to receive notice of an assessment on or before those days, to notify the home office thereof; and that a failure to pay the assessment within thirty days from said first days should work a forfeiture of membership. When the husband died he had failed for more than thirty days to pay an assessment which had been made, and had not informed the association that he had failed to receive notice of it. To an action brought by the beneficiary to recover the amount insured the association set up these failures in defence. *Held*,

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(1) That the association was not required to make assessments except when made necessary in order to meet existing claims;
(2) That the insured was entitled to notice of each assessment;
(3) That the failure of the assured to inform the association of a failure to receive notice of an assessment did not work a forfeiture of membership and of previous payments;
(4) That, as there was conflicting evidence upon the issue of fact whether notice of the assessment was mailed by the association to the assured, it was properly left to the determination of the jury.

THE case is stated in the opinion.

Mr. Alfred Taylor, with whom was *Mr. Frederick S. Parker* on the brief, for plaintiff in error.

Mr. Charles E. Perkins, with whom was *Mr. Solomon Lucas* on the brief, for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action is based upon a certificate of life insurance. There was a verdict and judgment in favor of the plaintiff, the beneficiary in the contract of insurance. The refusal of the court to direct a verdict for the defendant and its rulings upon questions of law occurring at the trial constitute the general grounds upon which a reversal of the judgment is sought.

The Mutual Reserve Fund Life Association, the defendant below, was organized under the laws of New York "to promote the well-being of its members and to furnish substantial aid to their families or assigns in the event of a member's death." Its constitution and by-laws, in force January 11, 1883, provided that within ninety days after receiving satisfactory notice and proof of the death of a member, the association should pay to the beneficiary named on its books, or to his or her assigns or legal representatives, the amount due according to the terms of the certificate of membership; and that seventy-five per cent of all net death assessments received by the association should go into the "death fund," the balance, together with the net earnings of the association, constituting the "reserve fund," no part of which could be used

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for expenses. They also provided: "On the first days of February, May, August and November (or at such other periods as the board of directors may determine) an assessment shall be made upon the entire membership in force at the date of the last audited death claim prior thereto for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member, as per the rates named in the certificate of membership, and the net amount received from such assessments (less twenty-five per cent to be set apart for the reserve fund) shall go into the death fund. A member failing to receive a notice of an assessment on or before the first days of February, May, August and November, for his share of the losses occurring during the time specified, it shall be his duty to notify the home office in writing of such fact. A failure to pay the assessment within thirty days from the first days of February, May, August and November, (or at such periods as may be named by the directors,) shall work a forfeiture of membership in this association with all rights thereunder. The provisions of this amendment shall take effect on and after August 1, 1883." Further: "If any member shall neglect to pay any dues or assessments when due, or if any of the conditions are violated upon which the certificate of membership is issued, then and in every such case such membership shall at once cease and determine and all payments made thereon shall be forfeited to the association, but the executive committee shall have the power to reinstate such delinquent member at any time within one year for good cause shown and upon satisfactory evidence of good health and upon payment of all delinquent dues and assessments."

The certificate of insurance here in suit was executed July 26, 1883. It contains, among others, the following provisions: "In consideration of the statements, representations and warranties contained in the application for this certificate of membership, and of the admission fee paid, and of the dues to be paid for expenses on or before the thirtieth day of June in every year during the continuance of this certificate, and of

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all mortuary assessments, as per table endorsed hereon, payable at the principal office of the association, in the city of New York, within thirty days from the date of each notice, the Mutual Reserve Fund Life Association does hereby receive Henry H. Hamlin, of Norwich, county of New London, State of Connecticut, as a member of said association. Whenever the death fund of the association is insufficient to meet the existing claims by death, an assessment shall be made upon the entire membership in force at the date of the last death, the same to be apportioned among the members according to the age of each member, for such sum as the executive committee may deem sufficient to cover said claims, and the net amount received from such assessment (less twenty-five per cent to be set apart for the reserve fund) shall go into the death fund. Within ninety days after receipt of satisfactory evidence to the association of the death of the above-named member during the continuance of this certificate of membership there shall be payable to Sarah C. Hamlin, (wife,) of Norwich, county of New London, State of Connecticut, if living at the time of said death, otherwise to the legal representatives of said member, the sum of ten thousand dollars from the death fund of the association at the time of said death or from any moneys that shall be realized to the said fund from the next assessment, to be made as hereinabove set forth, and no claim shall be otherwise due or payable except from the reserve fund as hereinafter provided." "This certificate . . . shall be subject to all the provisions and stipulations contained in the constitution and by-laws of this association, with the amendments thereto." Upon the subject of notices by the association to members, the certificate provided: "A notice addressed to a member at his post-office address as appearing upon the books of the association according to its usual course of business, shall be deemed a sufficient notice; and proof of mailing same, according to the usual course of business of said association, shall constitute and be deemed and held sufficient proof of compliance herewith on the part of said association." The same provision as to notice was in the constitution of the association.

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The certificate, by its terms, was to become null and void if any of the payments provided for in it were not made, "when due," at the office of the association in New York, or to one of its agents furnished with a receipt signed by its president, secretary or treasurer.

It was in proof that mortuary assessments were made four times a year up to August 1, 1883. But by a resolution of the board of directors, adopted July 11, 1883, it was declared that "hereafter the stated periods for making the mortuary assessments upon the members of this association under the provisions of the constitution shall be the first week days of February, April, June, August, October and December." Notice of this amendment of the constitution was duly mailed to Hamlin at his address appearing on the books of the association, along with notices of mortuary assessments made, respectively, August 1, 1883, October 1, 1883, December 1, 1883, February 1, 1884, and April 1, 1884. He became insane in the fall of 1883, and in November of that year was removed to a hospital for treatment — remaining in that condition until his death, which occurred February 15, 1885. It was admitted at the trial that all mortuary assessments against him prior to and including that of April 1, 1884, were paid, and that there was an assessment upon him of $16 on the 2d of June, 1884.

It was averred, in the defendant's answer, among other things, that due notice according to its usual course of business, of the mortuary assessment of June 2, 1884, was mailed at New York, postage paid, directed to the insured at his post-office address as appearing upon the books of the association, namely, "Mrs. H. H. Hamlin, Norwich, Connecticut;" that no information was given to it from any source of any failure to receive such notice; and that by reason of the non-payment of that assessment within the prescribed time, Hamlin ceased to be a member of the association, and the certificate held by him became null and void. To this the plaintiff replied that notice of such assessment was not mailed or sent to the insured or to her, nor received by either; that not until September, 1884, did she hear of the June assessment; that immediately after obtaining information of it, namely, on the

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6th day of September, 1884, she offered to the defendant the amount due on that and all subsequent assessments, but the latter refused to receive the same, claiming that the certificate of insurance had become void, and that the insured was no longer a member of the association. It was in proof that such an offer was in fact made and refused; that similar offers were made October 6, 1884, and every two months thereafter, each of which was likewise refused upon the ground that Hamlin had forfeited his membership in the association.

In December, 1884, application was made to the association (by whom does not appear) in the name of Hamlin for his reinstatement as a member. The application was denied. This fact was also pleaded in bar of the action.

By the terms of the contract the certificate of insurance issued to Hamlin became null and void, if he failed to pay, when due, at the office of the defendant, in the city of New York, or to its agent, furnished with the proper receipt, any assessment upon him. An assessment became due and payable "within thirty days from the date of each notice," that is, from the date of the notice of such assessment. But if the insured was entitled, of right, to notice — at least in the form prescribed by the contract, namely, by mail, according to the defendant's usual course of business — and such notice was not, in fact, given, the assessment, as to him, did not become due and payable, and he did not cease to be a member of the association by reason of his failure to pay it. That he was entitled to notice is too clear to admit of dispute. The clause in the defendant's constitution making it the duty of "a member failing to receive a notice of an assessment," on or before certain days, to advise the association of the fact, and the clause in both the constitution and the certificate of insurance, declaring that notice directed to the insured, according to his address as appearing upon its books, and mailed to him according to its usual course of business, should be deemed and held sufficient proof of compliance on the part of the association, necessarily imply that it was the duty of the association to give notice of mortuary assessments. It is true, the insured was informed by the defendant's constitution, as amended July 11, 1883, subject to

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which the contract of insurance was executed, that assessments would regularly be made in February, April, June, August, October and December, or at such other periods as the directors might determine. But if the association was bound to make assessments in those months, whether made necessary or not by its financial condition, still the insured could not know, in advance, the amount of an assessment; for such amount depended upon the state of the "death fund," the determination of the executive committee as to the sum required "to meet the existing claims by death," and the apportionment of that sum among members according to their respective ages and the rates specified in the certificates of membership. Now, it is contended, that the failure of the insured, in this case, to inform the defendant in writing that he had not received notice of the assessment of June 2, 1884, was alone sufficient to forfeit his membership. This suggestion necessarily proceeds upon the ground that the association had no discretion but to make an assessment on that day, and that the insured must be held to have known that one was made, although he could not have knowledge of its amount. This construction of the defendant's constitution and by-laws may well be doubted. We incline to the opinion that the association was not required to make an assessment except when the condition of the "death fund" made it necessary to raise money to meet existing claims by death. The contract — adopting almost literally the words of the constitution — required an assessment "whenever the death fund of the association is insufficient to meet the existing claims by death," and "for such sums as the executive committee may deem sufficient to cover said claims." This would indicate that an assessment should not or would not be made unless rendered necessary by the condition of the death fund. Be this as it may, the duty imposed upon the insured to inform the company of his failure to receive notice of an assessment was neither expressly, nor by necessary implication, made *a condition* of the contract, the non-performance of which would cause a forfeiture of membership and previous payments. If the defendant did not make an assessment, information in writing from the in-

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sured that he had not received notice of one would have been an idle ceremony. If it made one, and did not give the insured notice of it — at least in the mode prescribed — his failure to inform the association that he had not received notice of such assessment was immaterial and could not excuse its failure to give the required notice.

Did the defendant give notice to the insured of the assessment of June 2, 1884? That is the controlling question in the case. The court instructed the jury that it was not incumbent upon the defendant to prove anything more than that it mailed a notice of the assessment to the insured according to his address and its usual course of business, and that fact being proved it was entitled to a verdict whether the insured received the notice or not. Whether the clause in the certificate of insurance relating to notice means anything more than that proof of mailing a notice according to the defendant's usual course of business, directed to the insured at his post-office address as appearing upon its books, made a *prima facie* case of compliance upon its part with the terms of the contract, leaving the insured to prove, in order to prevent a forfeiture of his membership, that the notice was not in fact received by or for him, we need not determine. The defendant obtained the most favorable construction of the contract to which it was entitled under any view, and the only question open to it upon this writ of error is whether the court erred in holding that the burden of proof was upon it to show that a notice properly directed was mailed according to its usual course of business. We are of opinion that upon this point no error was committed. As the insured was not bound to pay an assessment of which notice was not given, at least in the mode designated, and as the duty to give such notice was, necessarily, upon the defendant, it could not claim a forfeiture except upon showing that that duty was performed. But the contention is, that the proof of such mailing was so overwhelming that the court erred in refusing to instruct the jury to find a verdict in its favor. We do not concur in this view. Without referring to the evidence in detail, we content ourselves with saying that upon the issue as to whether notice was, in fact,

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mailed, as claimed by the defendant, there was evidence both ways. The case, upon this point, was peculiarly one for the jury.

In this connection, it may be observed that while the defendant claims a forfeiture of the contract by reason of the failure of the insured to pay the June assessment within thirty days after notice thereof was mailed to him — which its officers testified must, according to the usual course of business, have been on the evening of May 31, 1884 — in its answer, verified by the oath of its president, it stated that mortuary assessments were made upon the insured on the first days of August, October and December, 1884, and that it mailed to him notices of each of those assessments; that he failed to pay any one of them; and that by reason of each one of such failures the certificate became void. According to the theory of the defence as thus disclosed by the answer, it may well be inquired why the defendant treated the insured as a member of the association after the time when, according to its present contention, he had forfeited his right of membership? And why did it refuse, in September, to accept payment of all previous unpaid assessments, and yet, in October, and again in December, make further assessments upon him as a member? Notwithstanding the above allegations in the answer, it was not claimed at the trial that notices of assessments subsequent to that of June were mailed to the insured. The case went to the jury upon the issue as to whether notice of the June assessment was mailed to the insured; the court ruling that if it was so mailed, the defendant was entitled to a verdict. This could have occurred only upon the ground that the defendant was mistaken when it alleged in its answer that notices of assessments made in August, October and December were mailed to the insured. We suppose the fact to be that no assessments were made in those months upon Hamlin; and the defendant would have appeared to better advantage if it had modified of record those parts of its verified answer averring not only that assessments were made in those months upon Hamlin, but that notices thereof were mailed to him. The whole question of mailing was left in such condition by

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the proof that it would have been error to take it from the jury.

Some stress is laid upon the fact that an application was made in December, 1884, in the name of the insured, for reinstatement as a member of the association. When information of the June assessment was received by Mrs. Hamlin, the beneficiary in the contract of insurance, in September, 1884, she promptly offered, through a friend, to pay all previous unpaid assessments upon the insured. The defendant refusing to accept such payment, and denying that the insured was any longer one of its members, the attempt was made to have him reinstated by the act of the association. That attempt — evidently made to avoid litigation — cannot be regarded as a waiver of the rights the insured had as a member; for those rights were not forfeited by his failure to pay the assessment of June 2, 1884, the only one in question; notice of which, as the jury found, was not given as required by the contract.

Numerous other points have been made on behalf of the defendant. But they are the merest technicalities, in nowise involving the substantial rights of the parties. We do not feel obliged to extend this opinion by a discussion of questions of that character.

We find no error of law in the record, and the judgment is

Affirmed.

UNITED STATES *ex rel.* BOYNTON *v.* BLAINE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1149. Argued March 5, 6, 1891. — Decided March 23, 1891.

The writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty, involving the exercise of judgment or discretion.

When a mere ministerial duty is imposed upon the executive officers of the government, that is, a service which they are bound to perform without further question, then, if they refuse, the mandamus may be issued to compel them.

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Statement of the Case.

A writ of mandamus confers no new authority, and the party to be coerced must have the power to perform the act.

The act of June 18, 1878, 20 Stat. 124, c. 262, subjects specifically the payment of the Weil and La Abra awards under the Mexican Claims Commission of July 4, 1868, 15 Stat. 679, to the control of the President; and the subject being thus confided to his judgment and discretion, mandamus will not lie to compel their payment.

Frelinghuysen v. *Key*, 110 U. S. 63, affirmed and applied.

SYLVANUS C. BOYNTON filed his petition in the Supreme Court of the District of Columbia, November 23, 1889, against the Secretary of State, for a mandamus to compel him to pay the petitioner, as assignee of one Weil, certain moneys in respect of a claim allowed under the convention between the United States and Mexico for the adjudication of claims of citizens of either country upon the government of the other, of July 4, 1868, (15 Stat. 679.) The petition set forth from Art. II of the treaty this clause: "The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever;" and also Art. V, as follows: "The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect and final settlement of every claim upon either government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred and thenceforth inadmissible."

The petition averred that it was stipulated that if the aggregate of claims allowed on one side exceeded the aggregate of those allowed on the other, the balance should be paid by the government against whom it so resulted in equal annual instalments, and that "the government so receiving such bal-

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ance undertook to make distribution and payment *pro rata* to the claimants in whose favor awards had been made."

The petition then stated the sum total of the awards; the balance to be paid over by Mexico to the United States; the payments made by Mexico; the final instalment still remaining due; and an amount remaining undistributed in the State Department paid by Mexico on awards as to the claims of Benjamin Weil and La Abra Silver Mining Company. It was further alleged that the commissioners failed to agree as to the claim of Benjamin Weil, which was referred to an umpire, who heard the case on the proofs submitted and made an award in favor of Weil, which, "together with all the other findings and proceedings of the commission," was duly reported to and filed in the State Department, and thereupon the said award became final and conclusive under the clause of the treaty hereinbefore recited. Petitioner further averred that on November 5, 1875, a part of the award made in favor of Weil was assigned to him by an instrument in writing, which, soon after its execution, was filed in the State Department, where it still remained; and that the Secretary of State paid to petitioner, on August 16, 1880, and March 8, 1881, certain sums applicable to the award in favor of Weil, leaving a balance due.

The petition then showed that on the 13th of July, 1882, on a complaint by Mexico that the award in favor of Weil was made on a false and fraudulent claim, a convention was negotiated and signed with that government, which recited that the President, after considering the circumstances of the case, and in view of the statute of June 18, 1878, being of opinion that the cases of Weil and La Abra Company should be reopened and retried, had concluded the convention with the President of Mexico for that purpose, which convention was, on the 26th day of July, 1882, submitted by the President in a special message to the Senate of the United States for its constitutional assent and concurrence; and that, while it was pending in the Senate, one Key, an assignee of a portion of the award in favor of Weil, instituted a proceeding in the Supreme Court of the District of Columbia for a writ of man-

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damus on the Secretary of State, and a peremptory writ was granted, but the Secretary of State appealed to the Supreme Court of the United States, which pronounced its decision January 7, 1884, reversing the judgment of the court below and denying the mandamus, "as will appear by reference to the case of *Frelinghuysen, Secretary of State*, v. *Key*, reported vol. 110 U. S. Reports, page 63."

The petitioner then gave his view of the decision of the Supreme Court of the United States, and said that the Senate of the United States had notice of it and of the grounds and reasoning on which the court reached its conclusions, but after due consideration and full deliberation, on April 21, 1886, "refused to assent to and concur in the said convention of July 13, 1882, less than two-thirds of the Senators present voting in favor thereof, and a quorum of the Senators being present;" and he contended that this made it certain that the Senate "held that there was no sufficient ground, reason or cause for excepting the said award made in favor of the said Weil from the operation of the finality clause of the treaty of July 4th, 1868. or for repealing or rendering that clause inoperative as to the said award." But petitioner said that nevertheless the Secretary of State refused to make distribution and payment to the said Weil and his representatives or assigns "of their distributive shares of the moneys now lying in the State Department, and due to him or them as aforesaid;" and on November 20, 1889, in response to a written demand therefor, replied "that for causes deemed lawful and sufficient" he was unable to comply therewith. Finally, petitioner averred that the moneys paid into the Department of State in respect of the Weil award were so paid in trust to distribute and pay the same to Weil or his representatives or assigns in satisfaction of his original claim against Mexico.

Petitioner thereupon prayed for process and that a peremptory writ of mandamus be granted upon hearing.

A rule to show cause having been entered, the Secretary of State answered, stating, among other things, the amount that would be paid to relator "if the President of the United States, in whose control is the said undistributed balance, should de-

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termine that it is not inconsistent with the public interests to pay the same, or so much thereof as would be ratably payable to the said Boynton," but saying, "that the President of the United States has forbidden the payment of any part of the said net balance on the ground hereinafter stated, and that for that reason no scheme of distribution of the said net balance has been made." The answer then alleged that the money paid by Mexico became, upon receipt, the money of the United States, and not in any way subject to the demand or control of the original claimants, who were not recognized by the said commission, the only parties to which, and who appeared before the commission, being the governments of the United States and the Republic of Mexico, each represented by one person, in virtue of Article II of the treaty.

It was further stated that the allegation of the petition that the United States was under some obligation "to make distribution and payment *pro rata* to the claimants in whose favor awards had been made" was not founded on any provision of the said treaty. And further, that the United States was "invested with the entire control of said claims to enable it to discharge any international duty that may attach thereto or to any part thereof, and that if the President of the United States has probable cause to think that good faith towards the Republic of Mexico and a proper regard for the honor of the United States require that any part of the money so paid by the Republic of Mexico should be withheld from distribution, this respondent is advised that it is the duty of the President to withhold payment of the same until a proper investigation can be had; and this respondent, answering, saith, that so it is that grave charges and representations impeaching the integrity of the evidence on which the award in the case of said Weil was made have been brought to the notice of the Government of the United States in a way to command its earnest attention, and that it is the desire of the President to have the said charges and representations investigated so soon as the Congress shall have provided the means for doing so."

The answer also averred that a bill had been reported to the Senate on June 20, 1888, "to provide for the desired in-

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vestigation by investing the Supreme Court of the District of Columbia with jurisdiction over the subject;" that "while the said charges and representations are pending the President of the United States hath concluded that payment of the money now demanded by the relator should be withheld;" and that the course thus taken by the President was in harmony with section 5 of the act of June 18, 1878.

The inference set up in the petition as deducible from the rejection by the Senate of the convention of July 13, 1882, was denied, and the contrary inference suggested, in view of the bill reported in the Senate, that "the refusal of the Senate to ratify the said convention was the result of a desire that the proposed investigation into the said charges and representations should be made by a tribunal deriving jurisdiction over the subject from a law of the United States."

It was then averred that the money awarded was not held by respondent impressed with a trust for the parties claiming to be entitled to the same, but as the agent of the President, whose control over it was complete, and who could at any time withdraw it from the control of the respondent; that to hold him accountable as a trustee might be to subject him to personal liability for the money; and that it would cause an embarrassing conflict to adjudge him responsible to private parties for a fund which it might be the duty of the United States to return to the Republic of Mexico, as decided in the case of *Frelinghuysen* v. *Key*, referred to by relator. The answer finally alleged that the petition related to a matter "which falls exclusively within the powers and competency of the President of the United States and this respondent as subordinate to him and subject to his direction and control, and which doth in nowise fall within the jurisdiction and competency of the judicial department of the government of the United States; and that it would involve an interference by the said judicial department with a matter which is exclusively committed by the Constitution to its coördinate, the executive department, for this honorable court to take cognizance of the matter of the relator's petition."

The cause having been heard, the mandamus was refused

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and the petition dismissed, whereupon a writ of error was allowed to this court.

The following may be taken as a sufficiently comprehensive statement of the matters upon which the judgment proceeded.

The time for decision fixed by the convention of July 4, 1868, was from time to time extended, finally until November 20, 1876, and payment of the first instalment to the government in favor of whose citizens the greater amount might have been awarded, was provided to be made on or before January 31, 1877. (19 Stat. 642.)

On the 19th of January, 1877, Mr. Secretary Fish invited the attention of Congress to the necessity of making provision for carrying the awards into effect, and pointed out that "an appropriation by Congress will be necessary for the payment of the amount of the awards against the United States, which sum, by the terms of the treaty, is to be deducted from the awards against Mexico and from the amount to be paid by Mexico. Provisions should also be made for the distribution among the several parties entitled to the money as it may be received, and also for the reimbursement to the United States of the amount paid by the United States toward the joint expenses of the commission, and which, by the terms of the treaty, is to be deducted from the awards." A bill to carry out the Secretary's recommendation passed the House during the Forty-fourth Congress, and was favorably reported in the Senate, but was recommitted to enable the committee to consider the complaints made by the Mexican government as to the manner in which the awards in favor of La Abra Company and Weil were procured. The Mexican government had, in the meantime, notified the Secretary of State of the existence of evidence, not within its possession before the awards were rendered, which, it was claimed, would establish the fact that the awards in the cases of La Abra Company and Benjamin Weil were procured by fraudulent imposition upon the commission and upon the government of the United States on the part of the claimants. The finality of the awards as between the two governments was not denied by Mexico, and the Mexican minister announced the intention

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of the government to comply with the treaty by paying the instalments as they became due. At the next session a bill passed both Houses, entitled: "An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the fourth day of July, eighteen hundred and sixty-eight," which was approved June 18, 1878. 20 Stat. 144, c. 262. Sections 1 and 5 of this act are as follows:

"That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, concluded July fourth, eighteen hundred and sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six; and whenever, and as often as, any instalments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And in making such distribution and payment, due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable; and the proportionate amount of any award of which by its terms the United States is entitled to retain a part shall be deducted from the payment to be made on such award, and shall be paid into the Treasury of the United States as a part of the unappropriated money in the Treasury."

"SEC. 5. And whereas the government of Mexico has called the attention of the government of the United States to the claims hereinafter named with a view to a rehearing, therefore be it enacted, that the President of the United [States] be and

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he is hereby requested to investigate any charges of fraud presented by the Mexican government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them until such case or cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified or affirmed as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them."

Under the provisions of the fifth section, President Hayes caused the charges of fraud, preferred by the Mexican government, to be investigated, and Mr. Evarts, then Secretary of State, made a careful examination of the supplemental evidence presented by Mexico, and submitted his conclusions to the President in August, 1879, which were in substance: That neither the principles of public law nor considerations of justice and equity required or permitted as between the United States and Mexico that the awards should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same; that, however, the matters called to the attention of the government on the part of Mexico brought into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of La Abra Silver Mining Company; that the honor of the United States required that these two cases should be further investigated by the United States to ascertain whether this government had been made the

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means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud; that if further investigation should remove the doubts, the honor of the United States would have been completely maintained, but if, on the other hand, the claimants should fail in removing these doubts, or they should be replaced by certain condemnation, the honor of the United States would be vindicated by such measures as might then be dictated; and that, as the executive had not the means of instituting and pursuing methods of investigation which could coerce the production of evidence or compel the examination of parties and witnesses, and the authority for such an investigation must proceed from Congress, the proofs and conclusions the President might come to thereon, if adverse to the immediate payment on these awards of the instalments received from Mexico, "should be laid before Congress for the exercise of their plenary authority in the matter." These views were adopted by President Hayes, and on the 15th of April, 1880, were communicated to Congress with another report of Mr. Secretary Evarts, under date of April 13, 1880, recapitulating his report of the preceding August, and concluding: "Unless Congress should now make this disposition of the matter, and furnish thereby definite instructions to the department to reserve further payments upon these awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the executive to accept these awards as no longer open to reconsideration, and to proceed in the payment of the same *pro rata* with all other awards under the convention." On April 27, 1880, a bill was introduced in the Senate directing the Court of Claims to investigate the claims in question, and was referred to the Committee on the Judiciary, which reported adversely, and in effect that the proper remedy was in a new convention, in which provision should be made for doing justice to all claimants. On a bill of like character the House Committee on Foreign Affairs made a favorable report.

In August, 1880, Mr. Secretary Evarts, having been notified through the Mexican legation of the intention of the Mexican

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government to commence suits to impeach and set aside the two awards, objected to such proceeding as in contradiction of the whole purpose of the convention, as well as of explicit provisions thereof; and accordingly no further steps were taken in that direction.

No definitive instructions were given by Congress in respect to the matter during that session, but after its close payments were made upon these awards by the direction of the President, the same as on the others. Another instalment was paid by the Mexican government and distributed to these claimants, with the rest, during President Garfield's administration. In this way five instalments were distributed. After President Arthur came into office he examined the cases further, and, "believing that said award was obtained by fraud and perjury," negotiated a treaty with Mexico, providing for a rehearing. On January 31, 1882, the sixth instalment was paid by Mexico to Mr. Frelinghuysen, then Secretary of State, but a distribution of this instalment to these claimants was withheld by order of the President.

The cases of *Frelinghuysen* v. *Key* and *La Abra Silver Mining Company* v. *Frelinghuysen*, 110 U. S. 63, were decided by this court January 7, 1884. President Arthur negotiated the convention with Mexico for a rehearing of the cases by a joint commission, July 13, 1882, and sent it to the Senate for its consideration. This convention was rejected by the Senate, April 21, 1886. On May 11, 1886, President Cleveland transmitted to Congress a report of the then Secretary of State, dated May 6, in respect to the claims in question. Mr. Bayard in his communication gave a resumé of the various proceedings touching the claims, and suggested that the President "notify Congress of the condition of the law and facts." He said: "It is within the province of the legislative branch of this government now to review the history of the proceedings — legislative, executive and judicial — connected with the two claims;" and, referring to the act of June 18, 1878, thus concluded: "This last-mentioned act of Congress contained the further provision — stated not additionally, but in the alternative to those above recited — '*or* until Congress

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shall otherwise direct.' To relieve the action of our government from any ambiguity of legislative expression, or the executive from any uncertainty as to his line of duty in relation to the awards in favor of Benjamin Weil and La Abra Silver Mining Company, under the treaty with Mexico, promulgated February, 1869, I suggest that the attention of Congress should be earnestly invoked to the consideration of the present status of these claims referred to, and the duty of the executive under an existing treaty, to which the force and effect of paramount law is given by the Constitution, in the event of the adjournment of the two Houses without further action in reference thereto."

March 5, 1888, President Cleveland in a special message transmitted a recommendation from the Secretary of State that "Congress take action to provide expressly for the reference of the claims in question to the Court of Claims or such other court as may be deemed proper, in order that a competent investigation of the charges of fraud may be made." The Secretary's communication referred to *Frelinghuysen* v. *Key*, and enclosed a letter from the chairman of the Senate Committee on Foreign Relations, dated March 5, 1887, containing a resolution embodying the views of a majority of that committee, and requesting the President to withhold further payments on the awards in question until the allegations of fraud "shall have been duly investigated by the courts of the United States, under the direction of the President, or under the further direction of Congress," and letters from members of the House of Representatives upon the same subject, dated March 5 and 7, 1887. The Secretary stated that it was thought that a proper judicial investigation of the claims in question might be secured under the twelfth section of the act approved March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," and that the department had sought the consent of the claimants in the Weil and La Abra cases to an investigation and decision of the allegations of fraud in relation thereto, by the Court of Claims, which was declined. The President's message closed with these words: "If for any reason this proceeding be con-

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sidered inadvisable, I respectfully ask that some final and definite action be taken, directing the executive department of the government what course to pursue in the premises. In view of the long delay that has already occurred in these cases, it would seem but just to all parties concerned that the Congress should speedily signify its final judgment upon the awards referred to, and make the direction contemplated by the act of 1878, in default of which the money now on hand applicable to such awards remains undistributed."

New bills were introduced, providing for a judicial investigation of the charges of fraud in connection with these claims, and on June 20, 1888, the Senate Committee on Foreign Relations made a report recommending the passage of a bill for that purpose, in the Weil case. An inquiry was subsequently ordered by the Senate with reference to the La Abra claim, which commenced September 24, 1888, and extended to February 27, 1889, and was reported upon March 1, 1889. The petition in this case was filed November 23, 1889.

Mr. George Ticknor Curtis and *Mr. A. H. Garland* (with whom was *Mr. H. J. May* on the brief) for plaintiff in error.

I. The award made against Mexico in favor of Benjamin Weil remains a final and conclusive adjudication in favor of a citizen of the United States against a foreign government.

II. The United States have not now and never have had any property, right or interest in the original claim or the award, or in money paid in by Mexico to meet and satisfy it.

III. The money so paid is by the terms of a statute in the official custody of the Secretary of State. The President of the United States has now no lawful control over it, and never had any lawful control over it, excepting for a temporary purpose during the pendency of a new treaty in the Senate. That control ended when the Senate rejected the new treaty.

IV. Congress has no constitutional power to pass the bill now pending in the Senate, which undertakes to confer on a municipal court of the United States jurisdiction to set aside

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the awards in question in a suit or suits instituted in the name of the United States to retry the original claims. This point is taken in case the court should think it necessary to look at the proposed senate bill.

Mr. Assistant Attorney General Maury for defendant in error.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636, 644. When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive officers of the government; that is, a service which they are bound to perform without further question, then if they refuse, the mandamus may be issued to compel them. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48. The writ goes to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act. *Brownsville* v. *Loague*, 129 U. S. 493, 501.

In view of these settled principles was the relator entitled to the writ?

Upon establishing at the seat of government an executive department to be known as the Department of State, with a Secretary of State as its head, Congress provided:

"The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the

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United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct." Rev. Stat. §§ 199, 202; 1 Stat. pp. 28, 68.

It is contended, however, that, in this instance, the final custody of the money was vested by the act of June 18, 1878, solely in the Secretary of State, and that it was thereby made his duty to distribute and pay the awards to the claimants independently of the direction or control of the President. But the act thus referred to as the basis of this application, when considered throughout as it must be, not only does not undertake to impose the payment of these awards as an independent duty upon the Secretary, but specifically subjects such payment to the control of the President. The Secretary of State was, indeed, authorized and required by the first section to receive from Mexico the whole money awarded, and to distribute the same from time to time as the instalments came in, among those in whose favor awards had been made, or to their legal representatives or assigns, but this was accompanied by the restriction, explicitly expressed, out of abundant caution, "except as in this act otherwise limited or provided." And by section five, the payment and distribution were limited, so far as the cases of Weil and La Abra Company were concerned, by the request to the President to investigate any charges of fraud as to those claims, and the provision that if he should be of the opinion "that the honor of the United States, the principles of public law or considerations of justice and equity," required that the awards, thus specifically named, or either of them, should be reopened, and the cases retried, it should be lawful for him "to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress shall otherwise direct."

Payment of the Weil award had been withheld by the President, after an investigation, but the case had not been retried and decided in a manner agreed upon by the United States and Mexico, nor had Congress otherwise directed. How

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then could Weil or his assignee, the relator, insist upon payment under the first section of the act in disregard of the limitation imposed by the fifth? On what principle could it be held that the duty was imposed upon the Secretary to pay an award by an act expressly providing that payment should not be made in a specified contingency, which had occurred? What power had he to do the thing demanded in virtue of legislation which forbade it to be done?

The political trust with which every government is charged, as respects its own citizens, was not the ground of relator's contention, but he relied on the act of 1878 as giving him the right to enforce the alleged obligation by judicial proceedings, and it was essential to the maintenance of his position that the record should bring him within its terms.

The principal propositions urged by counsel are, that "the award made against Mexico in favor of Benjamin Weil remains a final and conclusive adjudication in favor of a citizen of the United States against a foreign government;" that "the United States have not now and never have had any property, right or interest in the original claim or the award, or in the money paid in by Mexico to meet and satisfy it;" that "the money so paid is, by the terms of a statute, in the official custody of the Secretary of State; the President of the United States has now no lawful control over it, and never had any lawful control over it, excepting for a temporary purpose during the pendency of a new treaty in the Senate; that control ended when the Senate rejected the new treaty."

These propositions have already been substantially disposed of by the decision of this court in *Frelinghuysen* v. *Key*, 110 U. S. 63, from the principles announced in which we have no disposition to recede. It was there ruled, Mr. Chief Justice Waite delivering the opinion, that there was no doubt as to the conclusiveness of the awards under the convention of July 4, 1868, but that the language of the treaty was to be construed as used in a compact between two nations for the adjustment of the claims of the citizens of either against the other; that citizens of the United States having claims against Mexico were not parties to the convention; that while the

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claims of individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one government to the other on account of the demands of their respective citizens; that, as between the United States and Mexico, the awards were final and conclusive until set aside by agreement between the two governments or otherwise; that the right of the United States to treat with Mexico for a retrial was unquestionable; that each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection, as far as possible, against frauds and impositions by the individual claimants; and that where a fraudulent claim or false testimony was presented by a citizen for reference to the commission, this was an imposition on his own government, and it would be not only its right but its duty to repudiate the act, if it afterward discovered that it had in this way been made an instrument of wrong towards a friendly power. And the Chief Justice said: "International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. Every citizen who asks the intervention of his own government against another for the redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity." And considering the act of June 18, 1878, in its operation upon the question of further negotiations, it was remarked that no disposition was manifested "on the part of Congress to encroach on the power of the President and Senate to conclude another treaty with Mexico in respect to any or even all the claims allowed by the commission, if in their opinion the honor of the United

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States should demand it. At most, it only provides for receiving and distributing the sums paid without a protest or reservation, such as, in the opinion of the President, is entitled to further consideration. It does not undertake to set any new limits on the powers of the Executive." As to the fifth section of that act, it was observed: "From the beginning to the end, it is, in form even, only a request from Congress to the Executive. This is far from making the President for the time being a *quasi* judicial tribunal to hear Mexico and the implicated claimants and determine once for all as between them, whether the charges which Mexico makes have been judicially established."

And it was added that, "as between the United States and the claimants, the honesty of the claims is always open to inquiry for the purposes of fair dealing with the government against which, through the United States, a claim has been made."

The new convention was then pending in the Senate, and it was clear that the discretion of the executive department of the government to withhold all further payments to the relators until the diplomatic negotiations between the two governments on the subject were finally concluded, could not be controlled by the judiciary.

This is conceded by the relator, and such a concession is inconsistent with the contention that the award was a final and conclusive adjudication in Weil's favor, as an individual, against Mexico. As between nations, the proprietary right in respect to those things belonging to private individuals or bodies corporate within a nation's territorial limits is absolute, and the rights of Weil cannot be regarded as distinct from those of his government. The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it. Under this convention it was the balance that was to be paid, after deducting from what was found in favor of one government that which was found in favor of the other. So that the moneys paid in liquidation of that balance belonged to the United States, to be increased by appropriation to the extent of the amounts allowed Mexico,

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and the aggregate to be distributed to the claimants as might be provided.

In *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 259, where a sum of money had been received by the Secretary of State as part of an award made by the Spanish-American Claims Commission, which sum of money had been eventually paid to the petitioner, but had in the meantime been invested and earned interest, it was held that the Secretary was not liable to pay such interest to the petitioner, because the sum in question was withheld by the United States and the petitioner's claim based on the withholding was a claim against the United States, and the case fell within the settled principle that interest is not allowed on claims against the United States, unless the government has stipulated to pay interest or it is given by express statutory provision. There, under the agreement for arbitration, as here, under the convention, the claim was laid before the arbitrators and umpire "on the part of the government of the United States," and was presented with the testimony in its favor "only through the government of the United States," and "by the government of the United States." So the two advocates were spoken of as "representing respectively the two governments," and it was stated that "the two governments will accept the awards." "Thus by the plain terms of the agreement," remarked Mr. Justice Blatchford, delivering the opinion of the court, "the amount of the award in the case of Angarica was to be paid by the Spanish government to the government of the United States. It was paid by the Spanish government to the Secretary of State of the United States, representing the government of the United States. If there was any unlawful withholding from the petitioner of the $41,129.74, the money was withheld by the government of the United States, acting through the Secretary of State, and any claim of the petitioner, based upon an unlawful withholding, was a claim against the government of the United States."

Congress in furnishing the auxiliary legislation needed to carry the results of the convention under consideration into effect, requested the President to so far investigate certain

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charges of fraud as to determine whether a retrial ought to be had. This inquiry might have resulted in reopening the awards as between the two nations, or in such reëxamination in a domestic forum as would demonstrate whether the honor of the United States required a different disposition of the particular amounts in question. The validity and conclusiveness of the awards remained unimpugned so long as they were permitted to stand, and the principle of *res adjudicata* could not be invoked against the United States by individual claimants while the controversy raised as to them remained *in fieri.*

In *Frelinghuysen* v. *Key*, while conceding the essential value of international arbitration to be dependent upon the certainty and finality of the decision, the court adjudged that this government need not therefore close its doors against an investigation into the question whether its influence had been lent in favor of a fraudulent claim. It was held that no applicable rule was so rigid as not to be sufficiently flexible to do justice, and that the extent and character of any obligation to individuals, growing out of a treaty, an award and the receipt of money thereon, were necessarily subject to such modification as circumstances might require.

So long as the political branch of the government had not lost its control over the subject matter by final action, the claimant was not in a position, as between himself and his government, to insist on the conclusiveness of the award as to him. And while it is true that for the disposition of the case of *Frelinghuysen* v. *Key* it was sufficient that it appeared that diplomatic negotiations were pending which, as the court demonstrated, the act of 1878 in no manner circumscribed, it does not follow that the political department of the government lost its control because those negotiations failed.

On the contrary, that control was expressly reserved, for it was made the duty of the President, if of opinion that the cases named should be retried, to withhold payment until such retrial could be had in an international tribunal, if the two governments so agreed, or in a domestic tribunal if Congress so directed, and, at all events, until Congress should

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otherwise direct. The fact that a difference of view as to whether the retrial should be international or domestic may have arisen and led to delay, or that such difference may have existed on the merits, does not affect the conclusion. The inaction of Congress is not equivalent to a direction by Congress. The political department has not parted with its power over the matter, and the intervention of the judicial department cannot now be invoked.

The judgment of the Supreme Court of the District is

Affirmed.

HOFF *v.* IRON CLAD MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 225. Argued March 18, 1891. — Decided March 30, 1891.

In view of the previous state of the art, the first claim in letters patent No. 279,871, issued June 19, 1883, to Charles Hoff of Cincinnati, for an improvement in coal-hods, must be limited to the entire bottom of the crimped material and the resultant increase in its thickness; and, being so limited, it is not infringed by a coal-hod made after letters patent No. 304,033, granted August 26, 1884, to Henry S. Reynolds.

Whether both patents were not void for want of novelty, *quære.*

THIS was a bill in equity to recover damages for the infringement of letters patent No. 279,871, issued June 19, 1883, to Charles Hoff of Cincinnati, Ohio, for an improvement in coal-hods. In his specifications the patentee stated that his invention related "to coal-hods and similar sheet-metal vessels," and its object "to produce a stronger and better article than those in common use at a less cost of labor and material." He stated his invention to consist "in forming the bucket from a blank so shaped as to be bent into a cone or funnel-shaped body, then folding the cone end of said body in crimps to form the bottom." There were two claims to the patent, namely:

"1. The method of forming the body of a coal-hod or other similar vessel, which consists, substantially, as before set forth,

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in first forming a cone-shaped body from a suitable blank, then folding in the cone end of said body in crimps to form the bottom."

"2. As a new article of manufacture, a coal-hod formed of a single piece, and having its bottom crimped or folded to form a series of annular ribs or rings of progressively-increasing diameter, substantially as shown and described."

The defences were in substance —

1. That in view of the prior state of the art, as disclosed by various patents and devices, there was no novelty in the invention;

2. That defendant did not infringe.

The Circuit Court at first rendered a decree for the plaintiff, (27 Fed. Rep. 307,) and subsequently, upon a rehearing, dismissed the bill, (31 Fed. Rep. 45.)

Mr. George J. Murray for appellants.

Mr. J. E. H. Hyde for appellee. *Mr. Frederic Betts* and *Mr. Ernest C. Webb* were on the brief.

Mr. Justice Brown delivered the opinion of the court.

The essence of the Hoff patent consists in his method of manufacture, by taking a blank sheet of metal of the proper size and shape, folding it in the form of a cone, and then crimping the smaller end to form the bottom, which is thus made much thicker and more durable than the sides. The bottom shown in his drawings is composed of a series of concentric rings, but he states in his specifications that he does not desire to limit himself to any particular form of crimp or fold for the bottom of the hod, since it is evident that the form of the fold may be changed and still have the tapering end of the blank compressed to force the surplus metal to fold over and strengthen the bottom, and it is also evident that the blank may be varied to suit different shapes of hods.

To ascertain the exact scope of this patent it is necessary to examine the state of the art at the time it was issued. The

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crimping or doubling in of the ends of paper packages has, of course, been a common practice from time immemorial. The patent to George Smith, No. 124,093, issued February 27, 1872, exhibits a coal-hod in the shape of an inverted hollow cone, the apex of the cone being the bottom and centre of the hod. It differs from an ordinary coal-hod only in dispensing with the ordinary horizontal bottom, and contains no suggestion of the crimping process, which is the main feature of the Hoff patent hod, although a method is suggested of repairing the bottom of the hod by the substitution of a new cone, which constitutes the chief feature of the invention.

The patent to Edward F. O'Toole, May 22, 1877, No. 191,071, exhibits a coal-hod formed of a blank piece of metal, forced into a series of vertical crimps upon both sides of the hod. The crimps begin at the bottom of the hod and widen toward the top. The bottom, however, is rectangular, and composed of a single sheet of metal, so that the hod is really the weakest at the part which is subjected to the greatest wear.

Patent No. 199,370, of January 22, 1878, to Isaac F. Kearns, relates to a method of strengthening or reënforcing those parts of tin vessels most subject to wear and strain, in forming upon the bottom of the vessel a fold, which is bent up against the bottom until it is flat, so that at the fold there are three thicknesses of metal in close contact, to resist wear at this exposed point. After being thus provided with the flattened fold the vessel is retinned, so that the crevices on the inside and outside are closed, and water excluded from the fold. This, though evidently for a bottom-forming process, contains but a faint suggestion of the patent in suit — both the process of manufacture and the result being entirely different from those shown in plaintiff's patent.

The patent to Clark and Wells, No. 221,522, of November 11, 1879, for an improvement in metallic baskets, exhibits a body made of a rectangular blank or piece of sheet metal, which is bent in cylindrical form, with the ends of the sheet metal overlapping each other and riveted, while the metal is straight. The corrugations are made broad and shallow at

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their upper ends, near the top of the basket, and then gradually decrease in width and increase in depth toward the bottom. It is somewhat similar in principle to the O'Toole patent, and, like that, differs from the plaintiff's in failing to provide for an increased thickness for the bottom, which is an ordinary one and secured to the body by the usual seaming process.

The English patent to George Hazeltine, of December 19, 1873, is for "improvements in cylindrical and other boxes, cases, cans and similar vessels, and in apparatus for the manufacture of the same." While many of the articles enumerated in his patent are evidently contemplated to be made of paper or pasteboard, he expressly describes his product as consisting "of a box or other vessel of any suitable material, when constructed by folding, crimping, swaging or compressing," and the use of the mandril, punch and die in the formation of his boxes indicates that he is dealing with substances not easily flexible. The result is a box of any suitable material made by crimping or folding a portion of a previously prepared tube or hollow cylinder in such a manner as to form the closed end thereof, or, as described in his sixth claim, "an oval box formed from a tube or hollow cylinder, when the bottom of the same is made by folding or crimping in a portion of the body thereof." Even if the only material contemplated by Hazeltine were pasteboard, the adaptation of the same method of manufacture to a stiff material like zinc or sheet iron would not necessarily involve invention, so long as the process of manufacture is practically the same. His results are practically the same as those obtained by the Hoff patent, except that it would appear from the Hazeltine drawings that he did not contemplate that the entire bottom of the box should be formed of the crimped materials, but that the centre should be made of another piece of metal, over which the ends of the side pieces are crimped to form a solid bottom. The exhibit "Old Zinc Cylinder" is an application of the Hazeltine idea to the formation of a metallic cylinder for holding a roll of sheet zinc, and consists of a metal case or body, in which the ends or bottoms are formed in part of the same piece of metal

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which forms the sides, such metal being folded afterwards into crimps, and the crimps flattened down over a wooden head which is held in place by nails driven through the periphery of the cylinder into the rim of the head.

Conceding then that it was old to crimp in and fold the ends of cylindrical cartridges and boxes of pasteboard, or other stiff material, as shown in the Hazeltine patent, and also that it was old to turn the edge of metallic cylindrical vessels or packages to hold separate bottoms or heads of such vessels and packages, it is evident that, if the first claim of the Hoff patent can be supported at all, it can only be for the formation of the *entire* bottom of the crimped material, and the resultant increase in its thickness.

Defendant is making a coal-hod after a patent granted to Henry S. Reynolds, No. 304,033, dated August 26, 1884, the principal advantages of which are declared by the patentee to be an increase of strength and durability of the vessel, and a decrease of the cost of production. To accomplish these objects he *partially* forms the bottom out of the metal forming the body, and closes the aperture and completes the bottom by a cap. The blank is cut out in the ordinary way, and is then formed up by bending its edges around and uniting them to form the body. The next operation consists in placing the body in an inverted position, in a stamping press of the requisite power, and subjecting it to compression between dies, of suitable shape, to fold its lower edge inwardly, and to form a series of ribs tapering toward the centre. The next step consists in placing the body in a press, and, by the action of another set of dies, flattening the ribs, and thereby partially forming the bottom of the vessel out of a portion, and in one piece with the body, the walls of the ribs folding in upon the metal between them, and thus increasing the thickness of a portion of the bottom, and consequently, increasing its strength and durability. To finish the bottom, he employs a cap punched out of sheet metal, inserted in the partially completed bottom, its rim resting upon the inside, and its body projecting through the aperture, and so flattened down upon the crimps as to completely close the aperture and bind the ribs. Under

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the narrow construction we are compelled to give the Hoff patent, it is evident this is no infringement. Whether the result produced be or be not inferior to the Hoff hod, of course is not involved in this case. It may be true that Reynolds conceived the idea of his hod from an examination of the Hoff device; but he is none the less entitled to claim that the Hoff patent had been anticipated by prior devices, especially when such prior devices appear to show a complete anticipation of his own. Indeed, both of these parties seem to have been gleaning in a field already open to the public.

It is clear that the second claim of the Hoff patent for "a coal-hod formed of a single piece and having its bottom crimped or folded to form a series of annular ribs or rings of progressively-increasing diameter" is not infringed by the Reynolds device, as no such rings or ribs or anything approximating to them is shown in the defendant's hod.

The decree of the court below must be

Affirmed.

THE SYDNEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 224. Argued March 17, 18, 1891. — Decided March 30, 1891.

On a libel *in rem*, against two canal boats, brought by two insurance companies, alleging that they had insured a cargo of wheat on board of one of the boats, which was lost through the carelessness of those in charge of the two boats, and that they had paid $9211.75 to the insured, who owned the wheat, as its value, and received an abandonment of the cargo, and were subrogated to the rights of the insured, the District Court dismissed the libel, and, on appeal, the Circuit Court reversed the decree and awarded to the libellants a decree for $8252.47, condemning both of the boats therefor. In the District Court one of the boats was sold for $2100 and the proceeds were paid into court, and a stipulation for value as to the other boat, in $1000, was given by consent. The claimant, who owned both of the boats at the time of the loss, appealed to this court; *Held*, that this court had no jurisdiction of the appeal,

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because all that was involved was the $2100 and $1000, and the aggregate of those sums did not exceed $5000; and there was no decree *in personam* against the claimant.

The cases of *Elgin* v. *Marshall*, 106 U. S. 578, and *The Jessie Williamson, Jr.*, 108 U. S. 305, cited and applied.

IN ADMIRALTY. The case is stated in the opinion.

Mr. J. A. Hyland for appellants.

Mr. Edward D. McCarthy for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a libel in admiralty, *in rem*, filed on the 23d of July, 1883, in the District Court of the United States for the Southern District of New York, by the Providence Washington Insurance Company, of Providence, Rhode Island, and the Security Insurance Company, of New Haven, Connecticut, against the steam canal-boat Sydney and the canal-boat William Worden.

The libel alleged that on May 17, 1883, the Sydney and the Worden, owned by the same persons and engaged in the business of common carriers to and from the cities of New York and Buffalo, by way of the Erie Canal and the Hudson River, left Buffalo for New York, having on board, with other merchandise, 7900 bushels of wheat, of the value of $9211.75, consigned to Armour, Plankinton & Company, of New York, the owners thereof; that on May 29, 1883, the boats ran aground on Esopus Island in the Hudson River, whereby the Worden was so damaged that she sank and the wheat which was on board of her became a total loss, through the carelessness of those in charge of the two boats; and that on the 17th of May, 1883, the libellants, by a policy of insurance, insured Armour, Plankinton & Company on the said cargo of wheat against the usual marine risks and perils of the voyage from Buffalo to New York, and, under the policy, on the occurrence of the said loss, accepted from the insured an abandonment of the cargo as for a total loss, and paid to them $9211 75, and thereby became subrogated to all the rights of Armour, Plank-

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inton & Company, for such loss, against the Sydney and the Worden.

The libel prayed for process against the two boats, for a citation to all persons claiming any right, title or interest in the same, for the payment of the claim of the libellants, with interest and costs, for the condemnation and sale of the said vessels to pay the same and for such other and further relief in the premises as in law and justice the libellants might be entitled to receive.

On the 14th of August, 1883, one Charles E. Wager put in a claim to the two vessels as their owner. On the 15th of August, 1883, the District Court made an order, on the consent of the proctors for the claimant, that the Sydney be sold by the marshal. The marshal sold the Sydney for $2100, and he paid that sum to the clerk of the court, after deducting his costs and disbursements, amounting to $166.84. On the 28th of August, 1883, the proctors for the libellants and the claimant agreed that the value of the Worden be fixed at $1000, in lieu of an appraisement, and that a bond to the marshal be given in that amount, which was accordingly done.

On the 7th of September, 1883, Wager put in an answer to the libel, setting up that at the times alleged in it he was the owner of the Sydney and the Worden, admitting that the wheat on board of the Worden was consigned to Armour, Plankinton & Company, denying that the sinking of the Worden was caused through negligence; denying, also, that the libellants insured Armour, Plankinton & Company, and averring that any payment made by the libellants for the loss of the wheat was paid for the benefit and to the credit of Wager; that he paid the premium for the insurance on the wheat, to insure him against his liability as a common carrier, and with a distinct agreement with the shippers of the wheat and the libellants that, in case of any loss or damage to the wheat while *in transitu*, the payment of such loss or damage by the insurance companies should accrue to his benefit and relieve him from his liability as a common carrier for such damage and loss; and that he paid such premium with the knowledge and consent of the libellants, and in accordance with the well-

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established custom existing at Buffalo, whereby common carriers insured themselves against losses under their liability as such for damage and loss to the cargoes shipped on board of their boats.

The case was tried before Judge Brown, in the District Court, who dismissed the libel with costs, giving an opinion which is reported in 23 Fed. Rep. 88.

The libellants appealed to the Circuit Court, where the case was heard by Judge Wallace, who made a decree reversing the decree of the District Court, awarding to the libellants a recovery against both boats for $6175.89 and $1420.30 interest, and $656.28 costs in both courts, being an aggregate of $8252.47, and decreeing that the two boats be condemned therefor. The decree also recited that the Sydney had been sold and the proceeds of the sale, to wit, $2100, had been paid by the marshal into the registry of the court, and that the value of the Worden was fixed by consent at $1000, for which the usual stipulation for value was duly given, and directed that the proceeds of the sale of the Sydney be paid over to the proctor for the libellants, and that the stipulators for the value of the Worden cause the engagement of their stipulation to be performed. The opinion of Judge Wallace is reported in 27 Fed. Rep. 119. He filed the proper findings of fact and conclusions of law. Wager, the claimant, appealed to this court.

The first question which arises is as to the jurisdiction of this court, inasmuch as the proceeds of the sale of the Sydney were only $2100, and the value of the Worden was only $1000, the aggregate of these two sums not exceeding $5000. There was no decree against any person *in personam*, for any amount. The only decree was that the Sydney and the Worden be condemned for the $8252.47.

We are of opinion that this court has no jurisdiction of this appeal. In *Elgin* v. *Marshall*, 106 U. S. 578, a judgment had been rendered by a Circuit Court for $1660.75 against a town, on interest coupons detached from bonds which the town had issued. The bonds were for a larger sum than $5000. It was held by this court that it had no jurisdiction to reëxamine the

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judgment, on the ground that the statute limiting the appellate jurisdiction of this court to cases where the matter in dispute, exclusive of costs, exceeded the sum or value of $5000, had reference to the matter directly in dispute in the particular cause in which the judgment sought to be reviewed had been rendered, and did not permit the court, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties. It was further said that the court could not add to the value of the matter determined any estimate in money by reason of the probative force of the judgment itself in some subsequent proceeding.

The principle involved in *Elgin* v. *Marshall* was, on the authority of that case, applied by this court in an admiralty cause, *The Jessie Williamson, Jr.*, 108 U. S. 305, the facts in which were substantially like those in the present case. In the case of *The Jessie Williamson, Jr.*, the counsel for the appellant invoked the authority of *The Enterprise*, 2 Curtis, 317, as taking the case out of the rule laid down in *Elgin* v. *Marshall.* In *The Jessie Williamson, Jr.*, the libellant in a suit *in rem*, in admiralty, against a vessel, claimed in his libel to recover $27,000 for damages growing out of a collision. A stipulation in the sum of $2100, as the appraised value of the vessel, was given in the District Court. The libel having been, on appeal, dismissed by the Circuit Court, the libellant appealed to this court, which held that the matter in dispute did not exceed the sum or value of $5000, exclusive of costs, and that it had no jurisdiction of the appeal. In *The Jessie Williamson, Jr.*, it was said by this court, that, although the libellant might recover $27,000 against the vessel, it was plain that he could not recover on the stipulation for value, which represented her, more than $2100, and could not recover against the sureties in the stipulation more than that amount; and that, the suit being one *in rem* only, the value of the vessel, represented by the stipulation, was all that was in dispute, because that was all that the libellant could obtain or the stipulators lose in the suit. It was further shown, in the opinion in *The Jessie Williamson, Jr.*, that the facts in that case differed from the

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facts in the case of *The Enterprise;* so that, whatever was said by this court in apparent recognition of the propriety of the decision in the case of *The Enterprise* must be regarded as *obiter dictum*, and the views set forth in the opinion in the last-mentioned case, so far as they conflict with the actual rulings of this court in the cases of *Elgin* v. *Marshall* and *The Jessie Williamson, Jr.*, must be regarded as not having had the affirmative approval of this court.

The principle of the case of *Elgin* v. *Marshall*, that the sum or value really in dispute between the parties in the case before this court, as shown by the whole record, is the test of its appellate jurisdiction, without regard to the collateral effect of the judgment in another suit between the same or other parties, has since been repeatedly affirmed by this court, and that case cited and approved. *Opelika City* v. *Daniel*, 109 U. S. 108; *Bruce* v. *Manchester & Keene Railroad*, 117 U. S. 514; *Gibson* v. *Shufeldt*, 122 U. S. 27; *Vicksburg &c. Railroad* v. *Smith*, 135 U. S. 195.

The case of *The Jessie Williamson, Jr.*, has been cited with approval by this court in *Bowman* v. *Chicago & Northwestern Railway*, 115 U. S. 611, and *Gibson* v. *Shufeldt*, 122 U. S. 27.

It is very clear that if the libel in the present case had been dismissed by the Circuit Court, the libellants could not have appealed. The right of appeal must be reciprocal, and the statute does not give to one party an advantage over the other party, under the same circumstances. *Hilton* v. *Dickinson*, 108 U. S. 165; *The Jessie Williamson, Jr.*, 108 U. S. 305, 311.

The appeal is dismissed for want of jurisdiction.

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WORTHINGTON v. ROBBINS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 230. Argued March 19, 1891. — Decided March 30, 1891.

"White hard enamel," imported in 1884, and used for various purposes when a smooth or enamelled surface was desired, including the making of faces or surfaces of watch dials, the form or condition of it, as imported, affording no indication of the use to which it was to be applied, and it requiring to be ground or pulverized, and new processes of manufacture to be applied before it could be made of any practical use, the article in this case having been imported for use in making watch dials, and having been in fact so used, was subject to a duty of 20 per cent ad valorem, under § 2513 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, as an article manufactured in whole or in part, not therein enumerated or provided for, and not to a duty of 25 per cent ad valorem, as "watch materials," not specially enumerated or provided for in the act, under schedule N of § 2502 of the Revised Statutes, as enacted by the same § 6.

In order to be dutiable as "watch materials," the article, when imported, must be in such form of manufacture as to show its adaptation to the making of watches.

The case of *Elgin Watch Co.* v. *Spalding*, 19 Fed. Rep. 411, distinguished.

THE case is stated in the opinion.

Mr. Assistant Attorney General Parker for plaintiff in error.

Mr. J. P. Tucker for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action brought in the Circuit Court of the United States for the District of Massachusetts by R. E. Robbins and others, copartners as Robbins, Appleton & Co., against Roland Worthington, collector of customs for the revenue district of Boston and Charlestown, to recover an alleged excess of duties, paid under protest, on importations into the port of Boston in

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March and May, 1884, of an article known and described in trade as "white hard enamel."

The case was tried by the Circuit Court without a jury on the following statement of agreed facts: "The plaintiffs imported from a foreign country into the United States, to wit, into the port of Boston, in the District of Massachusetts, in the months of March and May, 1884, two lots of white hard enamel, in the steamships Marathon and Samaria, from Liverpool, and made entries of the same at the custom-house in said Boston, for consumption. The defendant, as collector of customs at said port assessed, liquidated and exacted duties upon this enamel at the rate of 25 per cent ad valorem as 'watch materials, not specially enumerated or provided for.' Plaintiffs duly protested to the defendant against the exaction of such rate of duty, and claimed that the lawful duty due upon this enamel was 20 per cent ad valorem, as an article 'manufactured in whole or in part, not herein enumerated or provided for.' A copy of the protest is annexed and made a part hereof. Plaintiffs duly appealed to the Secretary of the Treasury, who sustained the defendant in his action. In due time and form plaintiffs instituted this action for the recovery of duties paid in excess of twenty per cent ad valorem. It is agreed that the merchandise is and was in 1883 known and described in trade as 'white hard enamel;' that it is used for various purposes, including the making of faces or surfaces of watch dials, scale columns of thermometers, faces or surfaces of steam-gauge dials, and for other purposes when a smooth or enamelled surface is desired. It is further agreed that the form or condition of this merchandise, as imported, affords no evidence or indication of the use to which it is to be applied. It is further agreed that this merchandise, in the form or condition as imported, cannot be used for any of the purposes above described, nor for any purposes whatever of practical use to which it is adapted or ever applied; that before it can be applied to any practical use its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture applied. It is further agreed, if it would be competent to prove the same, that the plaintiffs are, and have

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been for several years prior to said importations, manufacturers of watches; that the enamel in controversy was imported by them for use in making watch dials, and was in fact so used. If the court shall be of the opinion that the duty lawfully chargeable upon this merchandise was 20 per cent ad valorem, the judgment shall be for the plaintiffs for the excess exacted, to be ascertained by an assessor, with interest and costs. On the contrary, if the court shall be of the opinion that the duty exacted was that lawfully due, then judgment shall be for the defendant for costs."

The protest referred to in the statement of agreed facts was as follows: "Boston, July 3d, 1884. Sir: We respectfully protest against your decision, assessment, liquidation and exaction of duties at the rate of twenty-five per cent ad valorem upon our importation of three packages of white hard enamel marked <KA> 1822/4 in the steamship Samaria from Liverpool and entered for consumption on the 12th day of May last, claiming that under the existing laws of the United States this merchandise is liable only either to a duty of ten per cent or twenty per cent ad valorem. This enamel is not enumerated by name in the tariff; therefore must be classed for duty purposes under some general term or description. It bears no similitude to any named article in the tariff, within the intent or provisions of section 2499 of the act of March 3, 1883, and cannot be classed under that section. It is a crude article, only useful for any purpose by the destruction of its present form and condition, and a complete process of manufacture, and is provided for by section 2513 of said act of March 3, at a duty of ten per cent ad valorem. Should it, however, be held that, on account of its present condition, it is a partially manufactured article, then it is provided for by said section 2513, at a duty of twenty per cent ad valorem. It is not a part of a watch or watch material, within the description and intent of the provisions of schedule N of said act of March 3. It is adapted to, can be, and is used for various purposes, and is not a part of any special article nor a material for any special article. We submit, under compulsion, to get our goods, and shall hold you and the government responsible."

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The court ordered judgment for the plaintiffs, and referred the case to an assessor to assess the damages. On his report, a judgment was entered for the plaintiffs for $53.14 and costs. To review that judgment, the collector has brought a writ of error.

The question for decision is, whether the article imported was liable to the duty assessed upon it by the collector, of 25 per cent ad valorem, under that clause of schedule N of section 2502 of the Revised Statutes, as enacted by section 6 of the act of March 3, 1883, c. 121, 22 Stat. 514, which read as follows: "Watches, watch-cases, watch-movements, parts of watches and watch materials, not specially enumerated or provided for in this act, twenty-five per centum ad valorem;" or whether it was liable to a duty of 20 per cent ad valorem, under section 2513 of the Revised Statutes, as enacted by the same section 6 of the act of March 3, 1883, which read as follows: "There shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum ad valorem; and all articles manufactured, in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem."

It is contended for the government that the article in question fell under the head of "watch materials." But we are of opinion that this contention is unsound, and that the article was dutiable at 20 per cent ad valorem, as an article manufactured in whole or in part, not otherwise enumerated or provided for.

By the statement of agreed facts, the article was, when the tariff act applying to it was enacted, known and described in trade as "white hard enamel," and "is used for various purposes, including the making of faces or surfaces of watch dials, scale columns of thermometers, faces or surfaces of steam-gauge dials, and for other purposes when a smooth or enamelled surface is desired." It thus appears that it is not used exclusively for the making of faces or surfaces of watch dials; and, although it is stated in the statement of agreed facts that the enamel in controversy was imported by the

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plaintiffs for use in making watch dials, and was in fact so used, there was nothing to prevent them from selling it to persons who would use it for the other purposes for which it is stated it is used.

It appears further, that the form or condition of the merchandise as imported affords no evidence or indication of the use to which it is to be applied; that, in the form or condition as imported, it cannot be used for any of the purposes mentioned, nor for any purposes whatever of practical use to which it is adapted or ever applied; and that, before it can be applied to any practical use, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture be applied.

It is apparent, from the facts stated, that the customs officers could not determine from an examination of the article to which of the uses named it was to be applied, or that it was to become the material of a watch. In order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported. In order to be dutiable as "watch materials," the article, when imported, must be in such form of manufacture as to show its adaptation to the making of watches.

The article in question was, to all intents and purposes, raw material. If it were to be classed as "watch materials," it would follow that any metal which could ultimately be used, and was ultimately used, in the manufacture of a watch, but could be used for other purposes also, would be dutiable as "watch materials." In order to be "watch materials," the article must in itself bear marks of its special adaptation for use in making watches. The fact that the article in question was used in the manufacture of watches has no relation to the condition of the article as imported, but to what afterwards the importer did with it.

The government relies upon the decision of Judge Blodgett, in the Circuit Court of the United States for the Northern District of Illinois, in *Elgin Watch Co.* v. *Spalding*, 19 Fed. Rep. 411, in which the question involved was whether an

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article known in trade as "watch enamel" was dutiable at 40 per cent ad valorem, under the last clause of schedule B of section 2504 of the Revised Statutes, as "manufactures of glass, or of which glass shall be a component material, not otherwise provided for," or to a duty of 25 per cent ad valorem as "watch materials," under schedule M of section 2504: and it was held that the article was not a manufacture of glass, but was dutiable as "watch materials." But in that case it is stated that the article there in question was known to the trade as "watch enamel," and was used only, so far as was disclosed by the evidence, for enamelling the faces or dials of watches. It does not appear by the report of that case whether or not there was any earmark upon the imported article to indicate its proposed use. That case was not, in its facts, at all like the present one, and this case must be decided upon the facts shown by the record.

Judgment affirmed.

PEAKE *v.* NEW ORLEANS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 852. Argued October 27, 28, 29, 1890.—Decided March 9, 1891.

The judgment at law on which the bill in this case is based, absolved the defendant from any primary obligation of debtor to creditor, and left it chargeable only as trustee of a fund out of which plaintiff's claim was to be paid; and it was unquestionably correct.

To the extent that the city of New Orleans may be considered as such a trustee, it is a compulsory trustee by force of the legislation of 1871, and not a voluntary and contractual trustee, and its responsibility should be restricted to the narrowest limits.

In failing to collect the uncollected assessments, the city was guilty of no dereliction of duty as trustee.

The various assessment proceedings, taken in connection with the decision of the Supreme Court approving the homologation of the tableaux, may have operated, if not to cast a specific lien upon the streets and other public grounds, at least to charge upon the city an obligation to the drainage fund for a proportionate share of the total cost of the drainage;

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but the city has, by its issues of city bonds in exchange for warrants, paid an amount on account of drainage far in excess of all the assessments charged against it, and nothing is due from it as trustee on this account.

By the purchase of the property of the canal company under the act of February 4, 1876, the city did not assume the duty of completing the contemplated work, and did not incur any responsibility for injuries resulting from its non-completion.

A municipality which abandons a contemplated work of public improvement, assumes thereby no obligation to parties who have invested on the faith and expectation of benefit from the completion of the work.

When a contract for local improvements in a municipality is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong upon the part of the corporation, neither justice nor equity will tolerate that it be charged as debtor therefor.

On March 18, 1858, the State of Louisiana passed an act to levee, drain and reclaim certain lands situate in the parishes of Orleans and Jefferson, comprising the cities of New Orleans, Jefferson and Carrollton, the whole area thereof being 26,026 acres. These lands were separated into three districts, entitled draining districts. To carry this act into effect a board of commissioners was appointed for each district. They were given full power to do the work, each in its district. Payment was provided for in this way: The commissioners were to prepare a plan of the district to be drained, showing the work to be done, the subdivision of the ground into lots, blocks, etc., with the names of the several owners thereof, and to deposit such plans in the office of the recorder of mortgages in the parish in which the lands were situated. After publication the several District Courts within whose jurisdiction the lands to be drained were situated were directed to decree that each portion of the property situated within the limits mentioned in the notices is subject to a first mortgage lien and privilege in favor of such board of commissioners for such amount as might be assessed upon the property for its proportion of the cost of draining, with interest thereon at six per centum per annum from demand thereof. The decree was to be recorded in the office of the recorder of mortgages, and the lien and privilege mentioned therein were declared to "take precedence over all

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mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, and shall attach to said property until the amount assessed and the interest thereon shall have been paid in full." The commissioners were thereafter to levy such uniform assessments upon the superficial or square foot within the drainage section as might be necessary for payment of the work. This statute also provided, that, on non-payment of the assessment, judgment might be recovered therefor in any court of competent jurisdiction, and the land so assessed sold according to law. An appropriation of eighty-one thousand dollars of the swamp-land fund was made by the legislature, for the purpose of aiding in carrying out the purposes of this statute. By a supplementary statute, of March 17, 1859, the several boards of commissioners were authorized to issue bonds, to be designated draining bonds. By these bonds it was contemplated that money should be raised at once for the payment of the work, in anticipation of the collection of the assessments. On March 1, 1861, another statute was passed, providing a summary remedy for the collection of these assessments. This statute declared that the homologation of the tableaux of assessment should operate as a judgment against the property assessed, and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceeding. Some work was done under these statutes, by the direction of the commissioners, but the exact amount is not disclosed, though evidently but an inconsiderable fragment of that which was contemplated. The boards of commissioners made plans and assessments in their several districts, as required. The assessment rolls were approved and homologated, and judgments rendered against the parcels of land and the owners thereof as the same were described in the assessment rolls. As the assessment was to be upon the superficial foot, obviously within the limits of the city of New Orleans, some portion of the assessment would rest upon the streets and other public grounds; and in the tableaux the city of New Orleans was named as the owner thereof, and judgments were rendered against it, as owner, for sums amounting in the several districts to $719,926.63.

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On March 2, 1869, an act was passed to repeal the laws creating the draining districts, and turning over to the mayors of the cities of New Orleans, Jefferson and Carrollton, and to the police jury of the parish of Jefferson, the control of the work and the possession of the property. Nothing seems to have been done under this act, and it is significant only as a declaration of the legislature of the failure of the boards theretofore created under prior statutes. On March 16, 1870, an act was passed uniting the cities of New Orleans and Jefferson into one city — the city of New Orleans.

On February 24, 1871, the legislature passed an act entitled "An act to provide for the drainage of New Orleans." This act empowered the Mississippi and Mexican Gulf Ship Canal Company to excavate draining canals and build protection levees within the corporate limits of New Orleans and Carrollton. The location of these levees and canals, whether large or small, was to be designated by the board of administrators of New Orleans, and all lands to be acquired for such purposes were to be held by such board for the benefit of that city. To provide funds for paying for this work, all property and rights acquired and held under prior statutes, by drainage commissioners or others, for the purposes of carrying into effect the drainage system, including therein real estate, plans, books and all uncollected assessments, were transferred to the board of administrators of the city of New Orleans; and all assessments theretofore made were confirmed, and in addition the board was authorized to make an assessment of two mills per superficial foot upon the lands within the draining districts. The statute also provided that all moneys so collected should be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as funds to be applied only for the drainage in accordance with the provisions of the act, and held in trust for the payment of such company, and ultimately for the benefit of the city of New Orleans should the same not be required for the purposes of drainage. The act also provided the price that should be paid — fifty cents per cubic yard — for the work to be done. In pursuance of this act, W. H. Bell, the surveyor of the city of New Orleans, devised a scheme

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for draining the lands, and prepared a plan of the work, which was entitled "chart of draining sections of New Orleans, showing present canals, with proposed protection levees and reservoir canals, May, 1872." He made an estimate of the cost which, after itemizing different portions, closed with the statement that "the whole work ought not to cost over three millions of dollars." On April 21, 1871, the city council of the city of New Orleans passed an ordinance, (ordinance No. 814,) which recited that the provisions of the act of 1871 made it mandatory upon the council to provide for an extensive system of drainage, and to recognize the claims and accounts of and make settlements with the Mississippi and Mexican Gulf Ship Canal Company for performing such work; and that the city council deemed certain portions of said act unconstitutional as depriving it of its proper control of the drainage system, and of its right voluntarily to contract for the work and agree on the price therefor; yet, in view of the importance of the work and the needs of the city, it ordained that "all matters appertaining to drainage, and the protection of the city from inundation, be placed under the immediate charge of the administrator of improvements, aided by the city surveyor," and directed a plan to be made, etc., of the work. Section 4 reads as follows: "The city shall issue warrants for the payment of the work as required by the act of the legislature, and in case of non-realization or non-collection of assets provided for therein, the same to bear eight per cent per annum interest; the said warrants to be issued with the understanding, to be inscribed therein or endorsed thereon, that they shall not be enforceable by suit and judgment, but if not paid within one year out of the proceeds of the draining tax and assets they shall be fundable in bonds of the city, bearing eight per cent interest, payable semi-annually, having ten years to run, and with due provision for retiring the same, and securing the punctual payment of interest and gradual extinction of the principal. The city shall have power to sell said bonds or give the same in payment of the work performed; but no sale or exchange shall be made at a price less than eighty cents on the dollar, exclusive of interest, and any holder of any fundable

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warrant, after thirty days' notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar."

On April 26, 1872, an act was passed by the legislature making provisions for the debt of the city of New Orleans. Section 13 reads as follows: "That for unbonded debts existing December 31, 1871, and unpaid at the time of the passage of this act, or caused by receipts of certificates of 1871, for revenues proper of 1872, and for excavations and levees, drainage machinery and revetments authorized by law or required for the protection of the city from overflow or inundation, the city may issue from time to time, as they may be required, bonds of the denominations of five hundred and one thousand dollars, having fifty years to run, and bearing seven per cent interest, principal and interest payable in gold in New York and New Orleans, and at any other points that the council may designate, with quarterly coupons, and that the bonds thus issued shall be called the new consolidated debt of New Orleans. No bonds shall be issued but by authority of the council, nor for a lower rate than ninety cents on the dollar. All issued for excavations and levees authorized by act No. 30 of 1871, or by drainage laws previously enacted, shall be marked 'drainage series,' and all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage; no bid to be accepted above par, and the right reserved to the council to reject all unsatisfactory bids."

The canal company entered upon its work, but, becoming embarrassed, on May 22, 1872, assigned all its rights to Warren Van Norden. By statute of March 23, 1874, the city of Carrollton was annexed to the city of New Orleans, so that the whole drainage district came within the limits of the latter city. The canal company, or its assignee, proceeded with the work, continuing it from July 21, 1871, to May 26, 1876. By January 1, 1875, the cost of the work performed amounted to $1,713,635.35. During that time the city officials issued drainage warrants to the amount of $1,422,263.69, and the holders of the warrants exchanged them for bonds endorsed "new consolidated gold bonds, drainage series," at ninety

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cents on the dollar. On January 1, 1875, by amendment to the constitution of the State, the city of New Orleans was forbidden to increase its municipal debt, in any manner or form, or under any pretext. This amendment in terms allowed the exchange of old for new bonds, permitted the issue of drainage warrants, payable only from drainage taxes, and not otherwise. On February 24, 1876, an act of the legislature was passed authorizing the purchase by the city from the canal company and its assignee of all their rights, under prior statutes, and all tools, implements and machinery in their possession or belonging to them, and the payment for the same in drainage warrants of the same character and payable in the same way as those provided in the act of 1871. At that time the work done by the company and its assignee amounted to $2,242,514.78. On June 7, 1876, the city of New Orleans purchased, as authorized, the rights and property above described, the consideration for the same being three hundred thousand dollars in drainage warrants. Little, if any, work was done thereafter by the city, and the abandonment of the work resulted in largely destroying the value of that which had been done, the rusting and decay of the machinery and tools, and the inundation and overflow of the portions of the lands attempted to be drained. The complainant being a *bona fide* holder of some of the warrants issued to the canal company after the passage of this constitutional amendment above referred to, commenced his action at law and recovered a judgment, which reads as follows: "It is ordered, adjudged and decreed that the plaintiff, James Wallace Peake, do have and recover of and from the defendant, the city of New Orleans, as provided by act No. 30 of 1871, as successor of the drainage commissioners established under acts 165 of 1858 and 191 of 1859, and the various acts of the legislature of Louisiana supplementary thereto and amendatory thereof, the sum of six thousand dollars ($6000) with eight per cent interest thereon from July 9, 1875, and costs of suit, both the sum recovered and costs of suit to be paid out of said drainage fund."

Thereafter this bill was filed in behalf of himself, as well as all other parties interested.

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Mr. Richard DeGray for appellant.

Mr. Grover Cleveland for appellant and for John Crossley & Sons, Limited, holders of drainage warrants.

Mr. Carleton Hunt for appellee.

Mr. Thomas J. Semmes for appellant.

Mr. Justice Brewer, after stating the facts as above, delivered the opinion of the court.

The bill in equity in this case was based on the judgment at law. That judgment determined the direct liabilities between the parties. It absolved the defendant from any primary obligation of debtor to creditor. It left it chargeable only as trustee of a fund out of which plaintiff's claim was to be paid. It was like a judgment, which in fact against an estate is nominally entered against the administrator thereof, to be satisfied out of the property of the estate and not out of the individual property of the administrator. The propriety of this judgment has not been questioned. No proceeding for review or reversal has been instituted. It has been accepted by the complainant as a correct adjudication of the rights between the parties; and in passing, it may be observed that its adjudication of rights was unquestionably correct. The scope of the entire legislation, from its inception in 1858 to its close in 1872, was local improvements for the benefit of adjacent property, with payment only through special assessments; and did not contemplate a work of general benefit, whose expense was chargeable to the municipality at large. The legislation of 1858, 1859 and 1861, under which the work was commenced, ignored the municipality entirely. It subdivided an area, of which the city was a portion, into draining districts, and cast upon a board of commissioners for each draining district the responsibility of the work and the assessments. The scheme was one of special assessments, as distinguished from municipal tax for general benefits. The distinction between the two is obvious and well recognized. It is stated by Cooley

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in his work on Taxation, page 416: "The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."

While the acts of 1871 and 1872 bring the municipal defendant into a scheme for subsequent duties, they do not bring it in as a primary debtor, for whose benefit the work is to be done, but simply as the agency by which the special assessments are to be collected; the trustee, as it were, of the special assessments for the benefit of the contractor. So that while the judgment at law measures the rights and obligations of the parties to this bill in equity, if we were at liberty to look beyond the judgment to the antecedent facts, we should be compelled to hold that the judgment rightfully determined those obligations; that the city never was chargeable with the burden of primary indebtedness, but stood to the plaintiff only as assessor and collector of the special assessments. Properly accepting this judgment at law as an adjudication of the measure of his rights against the city, the complainant charges the defendant with three violations of duty out of which he claims a recovery. He charges, in the first place, that the city did not collect these assessments when it ought to and could have done so. Secondly, he says that as owner of streets and pub-

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lic grounds it was directly liable to the drainage fund for a large amount, which it has not paid; and that, therefore, its failure as collector to collect from itself as debtor to the fund, authorizes a court of equity to proceed directly against it for those unpaid assessments. And, thirdly, he says that by the purchase under the authority of the act of 1876 the city assumed the duty of completing the contemplated work; that, failing to do so, it became responsible for all injuries resulting from such non-completion; and that, in consequence of such non-completion, anticipated collections failed and special assessments became non-collectible, and the failure becomes a proper ground of recovery against the city for any amount which could have been, but was not, collected.

Before considering these matters, it should be premised that to the extent that the city of New Orleans may be considered a trustee, it is a compulsory, and not a voluntary and contractual trustee. The legislation of February 24, 1871, by which, for the first time, it became connected with these local improvements and assessments, gave it no option as to price or party, but, prescribing and naming both, gave it simply discretion as to the places and extent of the work. It authorized and empowered the canal company to dig the works and fixed the price therefor. The obligations cast upon the city were purely statutory, and while they were, in respect to the party doing the work, and the collection of assessments, somewhat in the nature of a trust, they are more to be regarded as statutory obligations, a failure to discharge which puts less strain on the moral sense. Indeed, the statute connects rather the officers of the city than the city itself with the work. It is true the act provides that the title to the lands necessary for the works shall be procured and held for the benefit of the city of New Orleans; but it requires that such title shall be so procured and held by the board of administrators of the city. It also provides that the extent and nature of all improvements shall be designated by such board; and that such board shall be required to build and run all works and drainage machines necessary to lift the water from the drainage canals over into Lake Pontchartrain, and to do all other work neces-

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sary to facilitate the work of the contractor selected and employed by the State. The administrator of accounts was directed to draw the warrants on the administrator of finance for the work done. All the assets and assessments accumulated and made under the prior statutes were transferred to the board of administrators of the city. The prior assessments were confirmed and made exigible at such time and in such manner as the board of administrators might designate; and such board was authorized to make an assessment of two mills per superficial foot. So, that, while the title of the act is, "to provide for the drainage of New Orleans," and while the city comes into the statute as a party to be ultimately benefited, and whose officers are charged with the administration, yet, nowhere in its sections is the burden and duty of the work cast upon the municipality as such. The paramount idea of the statute seems to be not the casting of a duty upon the city, to be discharged in such manner and by such means as it shall select, but rather to transfer from the boards of the original draining districts to certain officers and agents of the city the duty of carrying into effect the drainage system.

We do not mean to be understood as affirming that no duty or liability was cast upon the city by this statute as such, or that the action of the city council thereafter and on April 27, 1871, was not within at least the implication of the statute. All we mean to say is, that neither the full power nor the general duty was cast upon the city, and that the designation of its board of administrators as the agency to carry on the work of drainage already undertaken by statutory direction by the local boards of separate districts placed upon the city only a limited responsibility for that which such board might do or omit to do.

The significance of these observations is clear. There is wide divergence in the authorities as to the circumstances under which the liability of a city to a contractor for local improvements arises in case of the non-payment of the special assessments. Into that field of inquiry we do not care to enter. See 1 Dillon on Municipal Corporations, 4th ed., sections 481 and following, and notes.

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If ever there was a case in which the responsibility of a city should be narrowed, this is one. By the legislation of the State, it was denuded of all freedom of action. It had no choice of contractor or price. Neither the property to be taxed, nor the means or method of collecting the assessments, was intrusted to its discretion. This is not a case in which there was a failure on the part of the legislative body, the city council, to prescribe and provide sufficient machinery for the collection of assessments. No superintendence of the financial department, whether as to the property to be assessed, the amount of the assessment or the collection thereof, was intrusted to the municipality. All this financial power was placed directly, by state action, without its consent, in one of its official boards. Thus denuded of freedom of action, it may properly insist upon the narrowest limits of responsibility. If the financial duty was devolved, without its consent, upon one of its administrative boards, and such board was derelict of duty, it may properly say to a complaining party, your remedy was mandamus, to compel prompt and efficient action by that board. In respect to a kindred question, the neglect of the city council, Judge Dillon pertinently asks, "why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment and proceed in the collection thereof with the requisite diligence?" Section 482, 1 Dillon on Municipal Corporations, 4th ed.

If that suggestion be pertinent where the dereliction is that of the city council, the legislative assembly of a city, the body charged primarily with the duty of making suitable provision for the discharge of all municipal obligations, how much more is it true when such general legislative assembly is without power and charged with no duty, and full responsibility rests with a separate administrative board? The contractor is specially interested in the full and prompt discharge of its duty by this administrative board. The remedy of mandamus is open to him to compel its action. On what principle of right and justice can he ignore this remedy and charge the municipality and burden all the taxpayers of the city?

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But supposing the dereliction of this board of administrators was an omission on the part of the city, what then, under the facts of this case, would be the measure of liability? It will be noticed that neither expressly nor by implication was there any guaranty of payment, as appeared in the case of *Memphis* v. *Brown*, 20 Wall. 289. Whatever obligations were assumed were only those of collection. The mere fact of non-collection does not prove dereliction of duty. From 1858 to 1871 this drainage work, with the duty of assessment and collection, was vested in certain local boards. The total assessments during those years amounted to $1,433,152.25. The amount collected in cash and warrants was $334,941.62. In addition, there was transferred to the commissioners, on non-payment of assessments, lands of the nominal value of $171,239.11; or a total collection of about half a million on a million and a half of assessments. It stands to reason, and scarcely needs the support of testimony, that during these many years the available assessments were collected; and that what remained, which was the large bulk, was charged upon property not worth the assessment, and for that reason was not collectible. The testimony of Mr. Guthrie, who was the representative of the canal company and its assignee, is "that he would not take the property bought in by the commissioners for non-payment of assessments, and pay the taxes thereon." If they, during these many years, were unable to collect but a small fraction of the assessments in cash, if the property they took was not worth the taxes, what can be said of the balance, or the possibility of enforcing the collection of assessments thereon?

Further than that, we are not limited to mere matters of inference. It appears affirmatively that the city provided an office and officers for the collection of these taxes; and, according to the testimony given by the assignee of the canal company, the officer in charge was diligent in his efforts to collect the tax. It appears, also, that the canal company had an agent to look after this matter of collection of taxes, who offered all reasonable inducements to secure their payment. Again, the assignee of the canal company, pursuing the rem-

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edy which was open to him, of mandamus to compel the seizure and sale, under proper writs, of the real estate subject to these assessments for the payment of certain warrants, secured an order of the court therefor. Fifteen hundred and seventy-one writs were issued in obedience thereto, and the gross proceeds of these writs was $32,466.69. It needs not the supporting testimony of the agent of such assignee to induce the belief that the most available property was that pursued by these proceedings. Still further, the efforts to collect were largely hindered by two decisions of the Supreme Court of Louisiana. One, in the case of *The Succession of Irwin*, 33 La. Ann. 63, by which practically the creation of the fourth drainage district, and the assessments therein, were declared null and void; and the other, in the case of *Davidson* v. *The City*, 34 La. Ann. 170, in which it was ruled "that a judgment for a drainage tax will not be enforced when it is shown that the property, far from being benefited, was injured by the alleged drainage."

When to all these is added the fact that large portions of these draining districts were swamp and overflowed lands; when one of the burdens of complaint here is, that the city, by failing to complete this work of drainage, had left the lands in such condition as to be of practically no value; it is obvious that if the duty of collection rested primarily and absolutely on the city, it would be difficult to hold it derelict of duty therein, and renders very pertinent the language of the learned Circuit Court which decided this case in the court below, (38 Fed. Rep. 779,): "As to failure to collect, when these assessments were handed over to the city to collect they had been assessed 13 years, and for that period had been in the hands of commissioners created expressly for the conduct of the drainage system, and with no other business. If such bureaus had failed to collect for such a period, the inference is strongly forced upon us that the assessments were substantially uncollectible, especially by a municipal corporation, herself crushed by debts. This is corroborated by the outcome of the mandamus proceedings taken by Van Norden, transferee of the company, and as warrant-holder, to compel the city to

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issue writs of *fieri facias* against the owners in 1876. To the application for that writ the city answered that the cost of the proceeding would equal, in her opinion, the amount realized. The result showed her estimate to be nearly correct; for the cost of the 125 writs selected by the warrant-holders, and therefore presumably the best for the purpose, was $34,000, and the amount collected under them only $36,000."

The second contention is that the city was itself a debtor to this drainage fund for nearly $700,000; that it had misappropriated a portion of the fund which it did receive; that as trustee of these assessments it was its duty to collect from itself as debtor to such fund; and that having failed so to do it can be properly charged in this proceeding. Considerable discussion took place on the argument, and is also found in the briefs, as to whether streets and other public property can be subjected to a lien for a share of the cost of local improvements, or whether the city stands in such relation to these properties that it can be held liable as owner. It is unnecessary to enter into the merits of this discussion. It may be that streets and other public grounds cannot be sold for non-payment of assessments for local improvements or other taxes, and it may be that the city is not technically their owner, and yet, at the same time, it may be true that the city, as representing the public, may, under proper proceedings, be charged as debtor for the proportion of the cost of local improvements, which, by the rule established, would fall upon such public property.

Neither do we need to examine the various decisions of the Supreme Court of Louisiana, cited by counsel, or seek to determine what is the law of that State in respect to this matter. For the purposes of this case we assume that the various assessment proceedings, taken in connection with the decision of the Supreme Court approving the homologation of the tableaux, operated, if not to cast a specific lien upon the streets and other public grounds, at least to charge upon the city an obligation to the drainage fund for that share of the total cost of the drainage determined by the proportion of the superficial feet of streets and other public grounds to the entire area of

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the drainage districts. Upon that assumption the obligation of the city to the drainage fund amounted to several hundred thousand dollars. Assuming that to be true, the contention of appellee is that it has paid into that fund far more than such amount. It is admitted that the city has issued sixteen hundred thousand dollars of its own bonds, taking up thereby a proportionate amount of the drainage warrants. It is not questioned by complainant that if this issue of bonds is to be taken as a payment of its indebtedness to the drainage fund, its obligations to that fund have been fully discharged, and, in addition, that the amount of such contribution in excess of its obligations to that fund more than covers all alleged misappropriation thereof. In other words, the sixteen hundred thousand dollars exceeds both the obligations of the city to the fund and its alleged misappropriation of any part thereof. But the contention of complainant is that there is nothing in the legislation, the ordinance, the warrants, the bonds, or other proceedings, which expresses an intent to make this contribution one in discharge of such indebtedness; and that, if it simply gave these bonds to the fund, if other and ultimate corporate benefit was the consideration of their issue, it cannot be affirmed that they were intended or ought to be taken as payment of the original obligation created by the assessment proceedings. The answer to this view is clear and just. It is true that ordinance number 814, which provides for the refunding of warrants into city bonds, contains no declaration that such refunding shall be in discharge of the city's obligation, as assessee, to the drainage fund; and that the assessment proceedings contain no receipt or release of the city as assessee, by reason of its issue of bonds. On the face of the record there is no discharge of the city's obligation as assessee; and if we rest upon the letter, it perhaps could not be denied that the city is still a debtor to that fund; but equity looks beyond the form to the substance of things, and these are substantial facts: For thirteen years a drainage system had been in force, in respect to which the city had no duty and no obligation other than as supposed owner and assessee of certain public grounds. The assessment proceedings had proceeded

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so far that there was a large apparent obligation of the city to the drainage fund. In 1871 an act of the legislature is passed, empowering the canal company to complete the work, transferring to a subordinate administrative body of the city all assessments theretofore made, and imposing upon it the further duty of assessment and collection. No provision is made by the legislative act for payment for the work done or to be done, otherwise than through the collection of these local assessments. In that emergency the city, by ordinance, says to the contractor named by the State, go on with the work, and if the warrants issued in payment therefor be not satisfied out of the assessment collections at the end of the year, they may be exchanged for city bonds. The work progresses, and warrants are issued and exchanged for city bonds, which have passed into the markets of the world and remain the undisputed obligations of the city, and to an amount far in excess of all the assessments charged against the city. In other words, the city, as assessee, owing the drainage fund a certain debt, puts into that fund twice the amount of the debt. Can any creditors of that fund thereafter equitably charge the city as debtor to that fund, because when it put its moneys into that fund it did not in express language say, I put these in in discharge of my indebtedness? It will be borne in mind that no new consideration passed from the contractor for this contribution of the city to the drainage fund. No legislative act contemplated direct obligation on the part of the city. From first to last all meant local improvement, to be paid by special assessments; and the contractor, all these years, had only legislative authority to look to the special assessments for payment. Its contract was entered into and performed, with knowledge that the only legal right it had for payment consisted in these assessments. Without further consideration, the city put into this fund these bonds, and they were accepted by the contractor. It is doubtless true that the motive of the city was to anticipate the collection of the assessments, and to put into the hands of the contractor available assets to insure speedy performance of the work, but the obligation of the contractor was to do the work, and it gave no new obligation,

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no new consideration, to the city or any other party, for these bonds. To say after this contribution of the city to this fund, a contribution without consideration except in discharge of its debt to the fund, that because it was not expressed that the contribution was to be taken as in discharge of the indebtedness, a court of equity will permit the contractor or its assignees to treat the contribution as a donation and charge the contributor as a debtor, would be a mockery of justice and an insult to equity. It must be borne in mind that a city is not like a private individual, with absolute freedom of contract and donation. It is simply the representative of the citizens and taxpayers, a trustee for their interests; it has no general powers of donation, and its contribution to a fund can never be considered as a donation when there is an indebtedness to that fund to be discharged. Indeed, if there were no indebtedness, the contribution, as a whole, might well be considered as *ultra vires*, and, if by the issue of negotiable securities to that fund an indefeasible obligation had been assumed by the city, it might in equity hold that fund as debtor to it for such amount. Much stress is placed by counsel for appellant on this point, and large reliance is placed on the fact that in these bond transactions there was no declaration of an intent to appropriate them to the payment of the city's indebtedness, as assessee, but, as we have indicated, such omission does not militate against the rights created by the contribution. If the city, as assessee, owed this fund seven hundred thousand dollars, it may rightfully answer to any demand of the contractor, or its assignees, that it pay such amount into the fund, I have already paid it, and it is no reply to that answer to say, when you paid it you did not declare that you paid it in discharge of that indebtedness. It is enough that the city paid it, and paid it without other consideration than the discharge of its indebtedness. We think this contention of the appellant must also fail.

The remaining proposition is, that under the authority of the act of February 24, 1876, the city purchased from the canal company and its transferee all rights, franchises and privileges possessed, and all tools, machinery and apparatus

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belonging to said company or its transferee; that having made such purchase, it abandoned the work then incomplete; and that the failure to complete the work left large portions of the realty within the drainage districts of comparatively no value, and thus rendered impossible the collection of the assessments. One satisfactory answer to this is, that the testimony indicates that if the work contemplated had been completed the property would have still remained in its valueless condition of swamp and overflowed lands, without other and further work. It would, to say the least, be ignoring the significance of a large amount of testimony, to hold that, if the work as contemplated had been finished, the lands would have been drained and made valuable; but we do not base our decision upon the results of a completion of the contemplated work; we rather place it upon the other ground — that a municipality which abandons a contemplated and intended work of public improvements, assumes thereby no obligation to any parties who have invested on the faith and expectation of benefit from the completion of the work. When a city or State contracts with an individual or company for the doing of certain work, the right remains to the contracting parties, at any time, to abandon that work; no obligation arises to third parties, who become interested in one way or another in the completion of the work; there is no guaranty that the contracting parties may not at any time abandon it; or abandoning it, that any contingent, further, and speculative liability will arise in favor of such third parties. When the city bought out the contractor, it did not assume his debts. A municipality may, with the consent of its contractor, at any time abandon contracted work. Such abandonment does not make the city liable for the debts of the contractor. So when the city purchases from the contractor his property invested, and his rights existing in the contract, such purchase creates no assumption of his debts. Having purchased, it may abandon the work; and creditors of the contractor cannot charge it as debtor on the theory that if the work had been completed their claims would have become of value. Into every contract between a municipality and an individual there enters, as between a contract between

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two private individuals, the right of determination at any time by agreement of parties, and such abandonment creates, as to third parties, no other or higher rights as against either the contracting parties than existed at the time of the mutually agreed upon abandonment. This contention, also, of complainant must fail.

We have given this case long consideration. The multitude of facts presented, the large interests involved and the learned and cogent arguments of counsel have compelled such consideration. We appreciate fully the appeal made by the distinguished counsel for complainant in closing his argument with this quotation from the opinion of three of the justices of this court in *Merriwether* v. *Garrett*, 102 U. S. 472, 520: "It is certainly of the highest importance to the people of every State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individual; it entails reproach upon the State." And we trust that this court will never falter in its duty of brushing away all false pretences, and holding every municipality obedient to the spirit as well as the letter of all its contract obligations. At the same time it is equally the duty of this court, as of all others, to see to it that no burden is cast upon taxpayers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality; and, when a contract for local improvements is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor.

The decree will be *Affirmed.*

Mr. Justice Harlan, with whom concurred Mr. Chief Justice Fuller and Mr. Justice Lamar, dissenting.

The Chief Justice, Mr. Justice Lamar and myself are unable to assent to the opinion of the court in this cause, and

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I will state as briefly as possible the view we take of the three controlling questions involved: Whether the city became debtor to the drainage fund for the assessments on the streets and other public places; whether it is liable as trustee for the individual assessments uncollected; and whether its debt and liability, if any, has been discharged either directly by payment or indirectly by an equitable set-off.

Did the city of New Orleans become debtor to the drainage fund for the assessments upon the streets, squares and other public areas? Counsel for the appellee contend that it did not; and in support of that position rely upon several propositions, the first of which only demands notice.

It is contended that as the city of New Orleans and the parish of Jefferson were not by the acts of 1858, 1859 and 1861 expressly declared liable, or given anything to do with the execution of the works in question — which works were of the kind usually constructed at the expense of the individuals benefited — the legislature did not intend that the city and parish should be numbered among the contributors, and that as a general rule such assessments are not construed to include public property.

The questions raised on this proposition involve the powers, capacities and liabilities of the city of New Orleans, a municipal corporation of the State of Louisiana, and consequently a part of its governmental machinery; a fact to be kept steadily in view when questions of the legislative power are being examined. And furthermore, the conclusions of the Supreme Court of Louisiana on those questions, even if they are different from the usual holdings (and we do not mean to imply that they are) should have great, if not controlling, weight with this court. It seems to us that this point has been settled by that tribunal. The case at bar does not present the first instance in the history of New Orleans of the experiment of drainage based on area taxation. In the year 1835 a company was incorporated for that purpose, in which the city was a stockholder. The company taxed every foot of land, including streets, etc. Litigation ensued. The point of liability was directly raised and distinctly decided. The Supreme Court

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sustained the tax on the streets and said: "The large proportion of the expense by which this burden is thrown upon the city for these streets meets, in some measure, that equity which has been urged upon our consideration, that as the work has been undertaken for the public good, the public ought to bear the charge of it, notwithstanding the benefit to the owner of the soil." *Draining Company, petitioner*, 11 La. Ann. 338, 343.

Indeed, what could be more just than that a local assessment, directly beneficial to all, should, in some form and to some extent, at least, be provided for by a general contribution? Why should the cost of it be defrayed by one species of property alone? And how obtain that contribution more simply than by an assessment on the public property, although such assessment may not be enforceable by a sale, and must be otherwise provided for?

The decision above quoted was made in the year 1856. Two years later the first of the statutes now under consideration, that of 1858, was passed. It is hardly conceivable that the legislature which passed that act were ignorant of the decision of 1856, or of the construction placed upon the statute of 1835. Or that, knowing it, they still intended to produce a different result in the act of 1858, not by adopting different but by reproducing almost the identical terms. The latter statute is substantially, indeed almost literally, a reproduction of the former; and that former statute had just been construed by the Supreme Court.

In the case of *Marquez* v. *New Orleans*, 13 La. Ann. 319, the court held that the city as the owner of the middle ground, or public promenade, running along the centre of Claiborne Street, was liable for one-half of the cost of improving that street, and in the case of cross streets, was liable for the whole cost, since as to these parts there were no abutting owners. The city was treated, and the case decided, exactly as if it were an individual proprietor.

So also in the cases of *Correjolles* v. *Succession of Fanchor*, 26 La. Ann. 362, and of *Barber Paving Co.* v. *Gogreve*, 41 La. Ann. 251, a question arose in respect to the ownership by the city of the public places, and the same conclusion was

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reached. How these cases may be reconciled with that of *Xiques* v. *Bujac*, 7 La. Ann. 498, 503, cited by the counsel for appellee to the point that public places are not held in fee, and that the term "title" is not applicable to them, or whether they overrule it and all similar questions, are immaterial inquiries. The court, in the four cases cited, held the city to be a proprietor, in the contemplation of the laws providing for local assessments, and in the absence of any express statutory direction on that point; and such is the exact question here. We therefore consider that question settled; especially when considered in connection with the fact that these assessments have been reduced to judgments and confirmed by courts of competent jurisdiction, the validity of which as well as the regularity of the assessments has been recognized and approved by the Supreme Court of Louisiana. *State of Louisiana ex rel. Van Norden* v. *Mayor &c. of New Orleans*, 27 La. Ann. 497.

We now advert to the claim of the appellant that the city is liable for the drainage fund, as delinquent trustee. That liability is asserted, on three distinct grounds: 1st, because the city unjustifiably failed to collect the assessments due the fund; 2d, because it failed, as subrogee of the original contractor, to continue the work of drainage, and thus secure, under the decisions of the Louisiana courts, the collectibility of the assessments; 3d, because she has paid out moneys belonging to the fund for purposes not permitted by the law. A short outline of some of the history of these matters will be proper.

The act of 1858 established the first, second and third drainage districts; organized a district board in each, with full control of the drainage in that district; gave the board the power to levy a uniform assessment per square foot on the land to be drained, not to exceed $350,000 in the aggregate, in each district; made the assessments first liens on the lands assessed; provided, in case of non-payment, that judgment therefor should be recoverable in any court of competent jurisdiction; that lands be sold for arrearages, costs and interest; and that the respective boards might purchase the same, and hold or dispose of them for the benefit of the districts.

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The act of 1859 authorized the boards to borrow $350,000 for each district and to issue bonds therefor; and directed the boards, on issuing bonds, to make assessments in conformity to the act of 1858, to be collected in not less than ten annual instalments, and to be applied exclusively to the payment or purchase of such bonds, and the payment of the interest thereon.

The act of 1861 provided that copies of the assessments made as above should be filed in certain designated courts, and, after notice, approved and homologated, and that they should then constitute judgments against the property assessed and the owners thereof, on which executions might issue as on judgments rendered in the ordinary mode, and that ten per cent be added to pay counsel fees and costs.

Under these statutes the boards organized, made the assessments, caused some of them to be homologated, collected a portion of the money and did some of the work. Until 1869 they continued to exist and to be more or less active in discharging their duties. The system, however, did not prove satisfactory by reason of the absence of responsibility and of unity of action on the part of the several boards. The act of 1869, therefore, consolidated the districts, abolished the boards, and appointed a commissioner, who was to succeed to their property, collect the assessments and levy and collect others on such parts of the district as were not included in the tableaux turned over to him. The commissioner, however, was not to do the work. That was to be done by a company, which was to receive all the collections in return for certain work.

By the act of 1871 an entirely new scheme was devised. The Mississippi and Mexican Gulf Ship Canal Company was authorized to do the work needed; the city board of administrators was empowered to locate the canals and levees, and required to build and run the machines necessary to lift the water over from the canals into the lake; the city surveyor to furnish the company monthly estimates of the work done, on which warrants were to be issued by the city auditor; the city treasurer to pay those warrants from any funds in the treasury to the credit of the company; and, if there was not the money

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necessary, to endorse the date of presentation, the warrant to bear interest therefrom. To provide the necessary funds, all the assets and the assessments provided for by the acts of 1858, and the various acts supplementary thereto, were transferred to the city, and the city was subrogated to all the rights, powers and faculties thereby conferred. The city was expressly required to collect the assessments, (which were, at the same time made exigible and confirmed,) in time to provide for the payment of the warrants. It was authorized to assess those lands in the three original districts, and such others included in the levees, as had not been already assessed; the assessments to be enforced as in the prior acts. All moneys collected were to be passed to the credit of the company, for the payment *only* of the drainage of New Orleans and Carrollton; and all property, not money, received, to be held in trust, primarily for the same purpose, and finally, if not so needed, for the city.

Such were the circumstances under which the city became the administrator and trustee of this important interest and fund: and such were the duties imposed upon her by those capacities.

What, now, were the assets committed to her administration, and for which there must manifestly be some sort of an account? They were:

1. A balance uncollected of a levy made in the first district, by the original board.....	$500,714 42
2. Ditto in the second district.....	289,907 40
3. Levy made by the city, under the act of 1871, in the third district.....	627,589 95
4. Ditto in the fourth district.....	281,416 81
Total amount chargeable.....	$1,699,628 58
This sum includes the assessments against the city, on account of public places, admitted never to have been paid, unless by issuance of bonds (of which hereafter).....	697,836 28
Leaving due on account of individual assessments.....	$1,001,792 30

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These large assets, having come to the hands of the city for the purposes of a great public trust, it was bound to relieve itself of the charge assumed by it in some way consistent with the rule of reasonable diligence. In view of its antecedent agency, and its coöperative action in the creation of the trust and its more than willing acceptance of it, added to the fact that it was the party to be ultimately benefited, we are not prepared to accept the theory that it was a compulsory and not a voluntary or contractual trustee, a failure to discharge whose obligations puts less strain upon the moral sense than if the obligations had been purely statutory. And in this connection, it is well to observe that this bill was filed for the purpose of an accounting. A trustee, city or not — it is immaterial — receives large assets, of which its own liability forms a considerable part; and the simple question is, how shall it relieve itself of the charge? How does the city do so in this case? Not by collection and disbursement according to the law and her duty, for it is conceded that about $1,400,000 was never collected. But —

(1) By a claim that the assessments were greater than the value of the lands, and, therefore, that they could not be collected from the lands. To this proposition there are several answers: First, as well argued by counsel for the appellee, it cannot be generally true in fact, since the lands are those on which the great city of New Orleans is built, and the assessments ranged from $69 to $140 per acre; second, in those instances in which the assessment was greater than the value of the lands, if there were any such, then the statute made provision by which the lands themselves, on failure of the owners to pay, should be sold and bought in by the city for the fund, and the duty of the city was to do this — in fact, it was done by the original board of the 15th district in the case of the asylum property; third, the statutes also provided, as has been seen, that personal executions should be issued against the owners for arrearages, damages and costs, and there is no showing, in our opinion, of anything like reasonable diligence in the use of this valuable right — a right which the Supreme Court of the State, in 1874, recognized and adjudged.

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We are impressed with the conviction that, although under the act of 1871, it was the duty of the city to press the collection of these funds at the rate of about $25,000 per month, yet it did nothing more than keep an office open at which the assessees might voluntarily pay, or not pay, as they wished.

(2) By a claim that the decision of the Supreme Court in the *Succession of Irwin*, 33 La. Ann. 63, held that certain personal judgments obtained by the summary processes given by the act of 1871 were void, and nullified the homologation of the tableaux for the entire fourth district. This decision was not rendered until the year 1881, the city then having had charge of this matter for ten years. The decision cannot, of course, be successfully offered as an apology for the antecedent supineness of so long a period. Prior to that, the Louisiana courts had been enforcing the statute of 1871, as we have already shown. And, further, in regard to the Irwin case, if it was of such grave import as to effectually prevent the collection of these moneys, then it was probably violative of contract rights, and on proper proceedings could have been avoided. If it was not of such import, then it is no answer to the obligation of the city to make the collections aforesaid. In fact, the testimony in this case would indicate that the city was deliberately obstructing, not forwarding, the collection of these funds.

In December, 1873, after having failed to collect the taxes to pay the warrants when due, the city adopted an ordinance allowing the taxes to be paid in warrants, thus compelling the contractor to sell at a discount or get no money at all. After collecting only $88,000 in three and a half years, with warrants falling due at the rate of $25,000 a month, and making no effort to collect except to keep an office, and never having issued an execution up to January, 1875, the city then *denied* the right of the warrant holders to have execution, and resisted the mandamus that resulted in the judgment of the Supreme Court sustaining such right. The city did not make any effort, worthy of mention, to collect the tax from the owners independent of the land. After the purchase of the plant from the contractor in 1876, under the statute passed to that end, and the subrogation of the city to all the right of such con-

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tractor, it deliberately abandoned the work, let the canals already dug fill up and the boats and other appliances, for which about $300,000 of warrants were issued, rot unused. By reason of that abandonment and the consequent non-completion of the system the Supreme Court of Louisiana decided, in the case of *Davidson* v. *The City of New Orleans*, 34 La. Ann. 170, that the tax could not be enforced. In 1881, pending the decision of the Davidson case, the mayor, by direction of the council, issued a proclamation advising the non-payment of drainage taxes until the validity thereof should be passed on by the Supreme Court, notwithstanding the previous judicial history of these transactions. In 1883 the council appointed a committee to investigate and report whether any drainage taxes were being collected and by what authority, and published in their proceedings the report whereby it was declared the large amount of taxes due and outstanding were not collectible, and in which was set forth the method by which the assignees might get relieved from the assessments.

Such are substantially the charges made by the appellant to show that the city, after seeking and accepting the trust, was opposing its execution, instead of enforcing it.

(3) By a claim that the decision of the Supreme Court in the case of *Davidson* v. *New Orleans*, 32 La. Ann. 245, to the effect that a judgment for a drainage tax will not be enforced where it is shown that the property received no benefit from the drainage, was a great hindrance, as its effect was to release from their liability for the assessment more than half of the first and third drainage districts and almost the whole of the second. The ground of the decision was the abandonment by the city of the work it was charged to do. It is manifest that the city cannot relieve itself of the obligation to collect the assessments avoided by its own default. To meet this proposition the appellee contends that the cost of completion would have been so great that the assessments would have been more than exhausted in completing the work, and the outstanding debt would have remained still unpaid. There were and are uncollected $1,423,235.31, including about $700,000 of the city's own assessment which should, under the circumstances,

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be considered money in hand. The appellee states the amount necessary to have completed the system, as projected, "at nearly or quite $700,000." The dues of the city alone would have completed the work according to appellant's own statement and have left a balance for the benefit of warrant holders of about $725,000.

But the appellee also claims that when completed there would still have been lands in the district unbenefited, on which the total assessments would have amounted to $500,000, and that these assessments, according to the Davidson case, would not have been collectible. If all that were correct, and if the city had no other resources for finishing of work than these assessments, still a margin of about $225,000 would have been left for the benefit of warrant holders. On the other hand, however, we cannot yield assent to the Davidson decision. We cannot and do not accept the proposition that where the legislature passes on the necessity of a great public work like this, and organizes a district for its prosecution, the assessments made are void unless the property assessed is directly and evidently benefited. What question of that kind may exist, is a question of the *district*, not of the individual properties. The Davidson decision would wreck every work of a like character we ever knew. The entire levee systems of the Mississippi River would be swept away at once, for the taxes would be void as to all lands above overflow from the river unleveed, and as to all those which lie so low as to remain wet and untillable in the absence of a supplemental system of drainage, even after the completion of the levees. Admit the principle that these general assessments or taxes are to be brought to the test of particular benefits, and the most unexpected and disastrous consequences would follow. Moreover, our criticism on the Irwin case, as to its violation of contract rights already fixed, applies to the Davidson case, if possible, with even greater force.

(4) By a claim that the constitutional amendment of 1874, which took effect on the 21st of January, 1875, in terms declared "that the city of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext." An answer to this claim we do not think necessary

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The next point calling for our consideration is the proposition of appellee that the liability, if it existed, has been discharged, either directly by payment, or indirectly by an equitable set-off. It was upon this ground the Circuit Court proceeded, and upon this ground the opinion of the majority rests. This claim is based upon the fact that, proceeding under act No. 73 of 1872, the city retired about $1,600,000 of drainage warrants by issuing for them its own seven per cent fifty-year gold bonds. The claim resolves itself into two heads, one of payment and one of set-off. But in order to consider either it will be necessary to advert again to the history of those bonds. The act of 1858, inaugurating the drainage enterprise, provided, as we have seen, for the expenses by an assessment on lands to be a lien on them reducible to judgment. The act of 1859 authorized the issue of the bonds by the commissioners of each district, not to exceed $350,000 in each district, to the payment and purchase of which, and the payment of interest thereon, the assessments were exclusively devoted. Then followed the act of 1861, which made the assessments personal liabilities, on which, when reduced to judgment, common executions might issue. Then the act of 1869 abolished the several boards of commissioners, in order to get rid of the obstruction arising from want of harmony among them, appointed a commissioner for the entire territory, and ordered the construction of the drainage canals to be paid from the assessments so collected. Then came the act of 1871. It provides for certain canals and levees to be dug and constructed by the Mississippi and Mexican Gulf Ship Canal Company; for the supervision of the work, and the administration of the funds by the city; and for the application of the assessments when collected only to drainage. Here first appears the direction to draw warrants on account of work done; and it is directed that if warrants were not paid, on presentation, they should draw eight per cent interest. Provision was made for assessments in addition to those already levied.

During all this there was evidently felt the pressure of the actual fact that the assessments were not collected with sufficient regularity and promptness to meet the urgent de-

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mands of a scheme so extensive, as well as of the want of a more acceptable security to contractors for the large expenditures entailed. Therefore, two months after the passage of the act of 1871, the city ordinance provided that, "in case the warrants issued for drainage works to be done by the Mississippi and Mexican Gulf Ship Company should not be paid within one year out of the proceeds of the drainage taxes and assessments, they should be fundable in bonds of the city, bearing eight per cent interest, payable semi-annually, having ten years to run, and with due provision for retiring the same, and securing the punctual payment of interest and gradual extinction of principal."

Then followed act No. 73 of 1872. This is the statute under which the bonds in fact issued, and an analysis of which is indispensable here. Its objects, as expressed in its title, were, "To authorize the council of the city of New Orleans to levy a police tax; to regulate the levies of taxes, the proceedings of tax suits, and the jurisdiction of the District Courts for the parish of Orleans in reference thereto; to define and punish forgery in certain cases; to authorize the funding of the floating debt; to consolidate, limit and provide for the debt of the city of New Orleans, principal and interest; to authorize a tax for the support of the city government, and to establish a fiscal agency, defining its duties, and for the better enforcement of the collection of all taxes."

Section 13 of the act runs thus:

"SEC. 13. *Be it further enacted*, etc., That for unbonded *debts* existing December 31, 1871, and unpaid at the time of the passage of this act, or *caused* by receipts of certificates of 1871, for revenues proper of 1872, and for excavations and levees, drainage machinery and revetments authorized by law or required for the protection of the city from overflow and inundation the city may issue from time to time, as they may be required, bonds of the denominations of five hundred and one thousand dollars, having fifty years to run, and bearing seven per cent interest, principal and interest payable in gold in New York or New Orleans, and at any other points that the council may designate, with quarterly coupons, and that

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the bonds thus issued shall be called the new consolidated debt of New Orleans. No bonds shall be issued but by authority of the council, nor for a lower rate than ninety cents on the dollar; all issued for excavations and levees, authorized by act No. 30 of 1871, or by drainage laws previously enacted, shall be marked "Drainage Series," and all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage; no bid to be accepted above par, and the right reserved to the council to reject all unsatisfactory bids."

Proceeding under this statute, the city issued about $1,600,000 of the drainage bonds, taking up therewith warrants issued for work done. It is claimed that in issuing those bonds the city thereby *paid off* both its own assessed dues to the drainage fund, as well as discharged any liability it may have been under on account of its non-feasance or mis-feasance as statutory trustee of the fund. We cannot accept that view.

It seems to us clear that it was not the intention of the legislature that such should be the effect of the issue of those bonds. That intention must of course control, as it is a question of the power of the municipality to issue negotiable bonds. The section authorized a series of bonds to be issued, and directed "that the bonds thus issued shall be called the new consolidated debt of New Orleans." They were to constitute *one* debt, the *consolidated* debt, not a variety of debts, nor even two distinct debts; and the statute manifestly proceeded on the idea that this one consolidated debt is to be paid, as all city debts are paid, out of the property of the city, and that without any express declaration to that effect. *United States* v. *New Orleans*, 98 U. S. 381. The purposes for which the bonds were to be issued were: (1) for unbonded debts existing December 31, 1871, and unpaid at the time of the passage of the act, or caused by receipts of certificates of 1871; (2) "for revenues proper of 1872;" (3) "and for excavations and levees, drainage machinery and revetments authorized by law, or required for the protection of the city from

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overflow or inundation;" one as well as the other, one no less than the other.

Now, certain of those bonds were to be marked "Drainage Bonds." What bonds, and why? The statute in words answers: "All issued for the excavations and levees authorized by act No. 30 of 1871, or by drainage laws previously enacted." No bonds could be lawfully so marked, except such as were issued "for excavations and levees;" not for drainage machinery or revetments; not even for excavations and levees to be thereafter made, unless they were such as the statutes named authorized; not for excavations and levees previously made, since they were already settled for by warrants, whatever such warrants might be worth; still less for the debts or liabilities of the city, however they may have been incurred. The city could not properly thus mark any bonds issued for any purposes except those expressly limited in the statute — those issued in payment for excavations and levees authorized to be made by the act of 1871, and the preceding acts. And why? For a reason entirely in harmony with the whole tendency of the entire series of statutes, and with the requirements of good faith to the contractors working under those statutes; for the purpose of expediting the work, and of giving increased value to those particular bonds.

The appellee contends that these bonds have only the force of warrants, and could only be paid out of the proceeds of the assessments already made, notwithstanding they had fifty years to run before payment could be demanded at all. Not so; they were privileged bonds in the series. And, beside the general liability of the city, the statute provided that all the proceeds of assessments not needed to pay off warrants, if any, coming in, (and in doing which the issue of that class was, *pro tanto*, prevented and rendered unnecessary,) should be an additional special fund with which the city should *purchase* said bonds before maturity at a price agreed on not exceeding par, thereby giving the bondholders, or some of them, if there were any such excess of receipts, an option to get their money before maturity. Whether a sound one or not, such was clearly the scheme, and it presupposed the continued existence

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and the continued collection of the assessments after the issue of the bonds; and plainly excludes the idea that such issue is to extinguish the assessments, or any of them. Not an intimation is given of any difference between one class of assessments and another; those of the city and those of individuals. Therefore, the city had no power to issue such bonds for the purpose of paying the assessments. It had, perhaps, the power to issue bonds of the unmarked sort for that purpose, if Van Norden, the transferee of the company's rights, had consented to receive them for that purpose; but it was not claimed that this was done or tried. The question is, as to the effect of the issuing of the marked bonds.

Moreover, in issuing these bonds the city had no intention to pay its assessments thereby; nor were they received with any such intention or understanding by the receiver of them. This is amply shown by the following facts:

(1) It was the regular custom to mark on the assessment rolls all the payments made. No such entry was made in this case.

(2) The issue of bonds, after they were authorized, was always and largely in excess of the homologated judgments against the city on its assessments.

(3) Judgments were being constantly rendered against the city on her assessments, after she had issued bonds far ahead of even her claimed liability, yet she never presented any claim for payment.

(4) The city administrator of public accounts in his report to the city council, July 1, 1872, said that the city had already issued certificates for $485,081 of the new consolidated bonds, drainage series; and he states the amount due by the city for the streets to be $763,378.69, the total amount originally assessed against the city. On the theory of payment it would have been only $258,297.69. To constitute payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose. *Dodge* v. *Freedman's Sav. & Trust Co.*, 93 U. S. 379, 386; *Ketchum* v. *Duncan*, 96 U. S. 659; *Carter* v. *Burr*, 113 U. S.

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737; *Wood* v. *Guarantee Trust Co.*, 128 U. S. 416; *Queen* v. *Ashwell*, 16 Q. B. D. 190, 224. These views are reinforced, if they need reinforcement, by the fact that the real question of payment or no payment lies between the city in its ordinary municipal capacity on the one hand and the city in its extraordinary capacity as statutory trustee on the other. Payment is a contract implying both proposal and acceptance; and under such conditions could the city have made such a contract without a clear statutory authority? We think not. If the legislature had designed to authorize the city to extinguish its own liability in this manner, it would have said so.

The remaining point to be noticed is that of the equitable set-off. The argument of the appellee on this line is as follows: The act of 1872 was only an enabling act to terminate the power of the municipality to issue bonds of the same tenor as the warrants which were taken up; that is to say, payable out of the drainage fund if that should suffice. The case, as here regarded then, is clearly that of a trustee, who has, by error, issued securities for the advantage of the *cestui que trust*. Having so issued the securities, it must result, inevitably, that the city is to be credited with the amount to the extent of which she has relieved the fund.

It is obvious that the entire force of this argument rests on the proposition that the drainage bonds were to be issued, payable only out of the drainage fund, and did not import, as contemplated by the statute, any direct liability on the city; also, that there was no error in the act of issuing the bonds. We have already, in the preceding passage, analyzed the statute, and shown that, according to our view, a direct liability on the city was exactly what was intended, the provision as to the drainage fund in connection with those bonds being merely a cumulative provision for them. That view, of course, disposes of this argument, since it denies the major premise.

Outside of the statute we will mention one or two facts confirmatory of the view that it was not the intention to have the drainage bonds paid from the assessments. First, assessments in 1872 were less by or about $200,000 than the known sum needed to complete the system devised by the act of

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1871; secondly, although the assessments were collected while the bonds were issued, so slowly and meagrely, as we have seen, that fact, overwhelming if they were to constitute the only resource for payment, seemed not to have the slightest effect on either the city or the contractor in this matter; and, finally, the fact, that the bonds were made payable fifty years after date seems of itself a sufficient contradiction of the idea that the only source for payment at that late date was these assessments.

We are, therefore, of the opinion that the court below erred in dismissing the bill. We think an account should have been stated on the basis indicated herein in its general outlines. The city was trustee by statute, and can be called to account by any person in interest. Exactly how the decree, when rendered, and the ascertainment of liability thereby made should have been enforced, it is hardly worth while to discuss in a dissenting opinion. The usual remedy is by mandamus where a public body cannot be subjected to ordinary process. That is a matter of detail only. The fact that the public property could not be sold on execution is no reason for absolving the city altogether from liability. The city should at least have paid what it itself owed on the assessments in question.

Upon these grounds we feel constrained to withhold our assent from the opinion and judgment of the court.

Mr. Justice Brown did not hear argument in this case, and takes no part in its decision.

Peake v. New Orleans, No. 459. Error to the Circuit Court of the United States for the Eastern District of Louisiana. Peake v. New Orleans, No. 41. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. United States *ex rel.* Peake v. New Orleans, No. 460. Error to the Circuit Court of the United States for the Eastern District of Louisiana. Brewer, J. The conclusions above stated in the opinion

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of the court in *Peake* v. *New Orleans*, compel an affirmance of the judgment in the case between the same parties numbered 459, and by stipulation cases numbered 41 and 460 are to be controlled by this decision, and the same orders will therefore be entered in them.

FULLER, C. J., and HARLAN and LAMAR, JJ., dissent from these judgments for the reasons stated in their dissenting opinion in *Peake* v. *New Orleans*.

BROWN, J., did not hear the arguments in these cases, and takes no part in their decision.

Mr. Richard De Gray, *Mr. Grover Cleveland* and *Mr. Thomas J. Semmes* for appellants.

Mr. Carleton Hunt for appellees.

TIMMONS *v.* ELYTON LAND COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 1325. Submitted March 2, 1891. — Decided March 30, 1891.

In this case the complaint described the defendant as a corporation chartered under the laws of Alabama and doing business in that State, one of the plaintiffs as a "resident" in North Carolina, and two other plaintiffs as "residents" in South Carolina. An amendment added twelve plaintiffs with no averments as to citizenship. As the jurisdiction depended upon citizenship; *Held*, that the Circuit Court was without jurisdiction.

MOTION TO DISMISS OR AFFIRM. The case is stated in the opinion.

Mr. Alexander T. Loudon for the motion.

Mr. T. H. Watts and *Mr. H. A. Herbert* opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court

This was an action brought by Margaret C. McElrath, Mary E. McElrath and Linda E. Timmons against the Elyton Land

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Company in the Circuit Court of the United States for the Northern District of Alabama.

The complaint averred "that Mary E. McElrath is a resident of the State of North Carolina, and that Linda E. Timmons and Margaret Celia McElrath are residents of the State of South Carolina," and that the defendant "is a corporation chartered under the laws of the State of Alabama and doing business within said State."

By the summons, the marshal was commanded "to summon the Elyton Land Company, a corporation chartered under the laws of the State of Alabama, and who is a citizen of the State of Alabama, to appear . . . to answer the complaint of Margaret Celia McElrath and Linda E. Timmons, who are residents of the county of Spartanburg, State of South Carolina, and Mary E. McElrath, who is a citizen of the State of North Carolina." The complaint was subsequently amended by adding the names of twelve other plaintiffs without any averment as to their citizenship.

In the bill of exceptions, which appears in the record, it is stated that "the plaintiffs were non-residents of the State of Alabama."

As the record does not show that the Circuit Court had jurisdiction of the suit, which depended upon the citizenship of the parties, the judgment must be reversed at the costs of the plaintiffs in error, and the cause remanded to the Circuit Court for further proceedings. *Menard* v. *Goggan*, 121 U. S. 253; *Robertson* v. *Cease*, 97 U. S. 646; *Brown* v. *Keene*, 8 Pet. 112; *Anderson* v. *Watt*, 138 U. S. 694.

Reversed.

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UNDERWOOD *v.* DUGAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 223. Submitted March 17, 1891. — Decided March 30, 1891.

Forty-three years after the ancestor of the plaintiffs acquired title, more than twenty years after that ancestor had positive information of the wrong upon which the claims set up in this bill in equity are grounded, twenty-five years after the purchase by the defendant in good faith and with no knowledge of the wrong, this suit was commenced, without any assertion of the right now set up having been made during all that time. *Held*, that these facts disclosed laches which forbade the interference of a court of equity.

IN EQUITY. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. W. Hallett Phillips for appellants.

Mr. Sawnie Roberson and *Mr. W. O. Davis* for appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

The facts in this case are these:

On March 1, 1838, one Fines Y. Roberson, whose name seems to have been spelled in different ways, sometimes as above stated, sometimes as "Phineas Robertson," again as "Phiness Y. Robinson," still again as "Phiness Robinson," received from the proper authorities of the State of Texas the following land certificate, entitling him as therein provided, and on the conditions therein named, to one league and labor of land:

"No. 127.

"This is to certify that Fines Y. Roberson has appeared before the board of land commissioners for the county of Houston and proved, according to law, that he arrived in this Republic, Jan'y —, eighteen and thirty-five, and that he is a

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married man and entitled to one league and labor of land upon the conditions of paying at the rate of three dollars and fifty cents for each labor of irrigable lands, two dollars and fifty cents for each labor of temporal or arable land, and one dollar and twenty cents for each labor of pasture land which may be contained in the — secured to him by this certificate.

"Given under our hands the 1st day of March, 1838.

"E. GASSETT, *President.*

"JOHN WORTHAM,

"Attest: SAM'L G. WELLS, *Clerk.* *Ass. Com'rs.*"

On the 5th day of March, 1838, he transferred a one-half interest to Warner L. Underwood. The evidences of this transfer were an assignment on the back of the certificate, as follows:

"For value received, I assign and convey unto Warner L. Underwood the within certificate, as by deed also of this date. March 5th, 1838.

"OSCAR ENGLEDOW.

"H. B. DANCE. "FINES Y. ROBERSON."

and a deed of the same date, to the same party, which disclosed that only one-half interest was conveyed, the other one-half being reserved for the benefit of Joshua Robbins, to whom Roberson had already transferred such interest. No land was ever located by Underwood or Robbins under this certificate. Soon after this Underwood returned to Kentucky and remained there until his death. Thereafter, and on the 12th of May, 1855, a written assignment of this certificate was made by Roberson to Dennis Trammell. On the back of the certificate was pasted a thin brown paper, apparently for the purpose of protecting the certificate against wear and tear, but at the same time effectually concealing from observation the assignment to Underwood, written thereon. This certificate, thus on its face the property of Roberson, together with the accompanying written assignment to Trammell, were offered for sale to S. W. March, who, ignorant of any pre-

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vious transactions, purchased the same in good faith, paying one thousand dollars, and receiving an assignment and transfer from Trammell. This was on June 23, 1855. March located this certificate, and on August 8, 1855, received from the State of Texas a patent for the lands located thereunder. On May 15, 1860, by letter from one James Jeffries, Underwood was notified of the location of the land by March, and of the patent to him, together with the fact of the concealment of the transfer from Roberson to himself, by means of the paper pasted on the back of the certificate. No action was taken by Underwood during his lifetime. He lived nearly twelve years after the receipt of this information, dying in February, 1872. During the last three or four years of his life, by reason of disease, he was incapacitated for attention to business. March, the purchaser of the certificate, the locator of the lands, and the patentee from the State, died on the 29th of July, 1878. This suit was commenced on June 13, 1881. The plaintiffs claim as heirs of Underwood, or purchasers from the heirs of Underwood and Robbins, and represent all the rights of Underwood and Robbins, except an undivided interest of one-sixteenth, belonging to A. N. Robbins, one of the heirs of Joshua Robbins, who was made a defendant, and who submitted to an order *pro confesso*. The other defendants claim under the patentee, March. The principal defence is laches, which in the judgment of the Circuit Court was sufficient, and the bill was ordered dismissed. 24 Fed. Rep. 74. In that conclusion we concur.

From the facts above stated, it appears that the bill was not filed until forty-three years had passed since the ancestors of plaintiffs acquired title to the certificate. During all these years no assertion of right was made by either Underwood or Robbins, or those claiming under them. Twenty-five years before the filing of the bill, March purchased the certificate in good faith, paying a large consideration, located it and obtained a patent for the lands from the State. He entered into possession and improved the lands. The original purchasers, Underwood and Robbins, are dead, the subsequent purchaser and patentee is also dead, and with their death the main wit-

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nesses to this transaction have all passed away. The property has become of value, and now, after a lapse of nearly half a century, plaintiffs assert a claim which the owners have ignored for all these years. It appears that Underwood, when he returned to Kentucky, soon after the purchase, returned in consequence of the death of his father, who left a large estate, somewhat complicated. Probably he considered attention to such estate, and its large interests, of more importance than this float of doubtful value, in a distant country of large area and small population. But whatever may have been the reason, surely this long delay discloses laches, and such laches as forbid the present interference of a court of equity. We have had before us this present term a somewhat similar case coming from the same State and the same district, *Hanner* v. *Moulton*, 138 U. S. 486. There, as here, the controversy arose in respect to land taken under a land certificate issued in 1838. There, as here, the plaintiffs claimed title by succession from the original purchaser, who had died prior to the commencement of the suit. There, the adverse title under which defendants claimed did not arise until 1869, and knowledge of the adverse title did not come to plaintiffs until 1876. The bill was filed in 1882, a few months after the bill in the present case. We held on full review of the rulings of the Supreme Court of Texas, as well as the decisions of this court, that laches was a complete bar to the suit. Summing up at the close of the opinion, Mr. Justice Blatchford, speaking for the court, said: "An interval of nearly thirteen years elapsed between the sale of the certificate and the filing of the bill in this suit. The value of the property has largely increased. Parties interested and witnesses have died, and the memory of those who survive has decayed. Not a person who is now interested in any of the land is implicated in the fraud charged in the bill. Under the facts above stated, the plaintiffs have been guilty of such laches that they cannot have any relief in a court of equity. *Speidel* v. *Henrici*, 120 U. S. 377, 387, and cases there cited; *Richards* v. *Mackall*, 124 U. S. 183, 187, 188." See also *Landsdale* v. *Smith*, 106 U. S. 391.

Much stronger than that is this case. Not thirteen, but

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twenty-five years, intervened between the sale of the certificate, the patent of the land and the commencement of this suit. More than twenty years before its commencement, Underwood, under whom plaintiffs principally claim, had positive information as to the wrong which had been done, and the manner in which it was done. All the parties to the original transaction are dead. The property has increased in value, and now these plaintiffs are invoking the aid of a court of equity to dispossess those who personally have acted in good faith, who were not parties to, or cognizant of, any wrong, and who have occupied and improved the property in full reliance upon the sufficiency of the title they possessed. Surely if laches is ever recognized as a complete bar, it ought to be in this case. And this doctrine of laches rests on no arbitrary or technical rule. It is founded on the plainest principles of substantial justice. Ownership of property implies two things: First, attention to it; second, a discharge of all obligations, of taxation or otherwise, to the State which protects it. When it appears that one who now asserts a title to property, arising more than the lifetime of a generation ago, has during all these years neglected the property and made no claim of title thereto, a reasonable presumption is that, whatever may be apparent on the face of the instrument supposed to create the title, were the full facts known, facts which cannot now be known by reason of the death of the parties to the transaction, it would be disclosed that no title was in fact obtained; or, if that be not true, that he considered the property of such little value that he abandoned it to the State which was protecting it. So, if, the title being beyond challenge, during these years he pays no taxes thereon, makes no effort to improve or increase its value, and, by the labor and efforts of others, under the protecting power of the State, large value has been given to it, the State may properly say to him, as may also the individuals who have thus wrought this change in value: You abandoned the property when it was comparatively valueless; you have taken no share in the burdens of taxation or the support of the State; others have toiled, paid taxes, and made the property valuable; therefore,

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because of your shirking of duties and obligations, you shall not, whatever may have been the nature of your title in the first instance, be permitted to appropriate the value thus produced by others.

Looking back through the fifty years which now have passed since Underwood purchased an interest in this certificate, general history discloses a marvellous change in the condition of things in the State of Texas. Then an enormous territory, a scanty population, real estate of comparatively trifling value, sold by the league and not by the acre; now, a State of large area it is true, but with a vast and growing population, whose industries have made its real estate of value. Surely a court of equity may look with jealous eye upon the claims of any one to a share in that value, based upon a title acquired half a century ago, a title which he has ignored all these years, and a value in the accomplishment of which he has had absolutely no part.

We see no error in the ruling of the Circuit Court, and its decree is *Affirmed.*

DOLAN v. JENNINGS.

KIBBE v. JENNINGS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 265, 266. Argued March 26, 1891.—Decided March 30, 1891.

A decree was entered in the Circuit Court in favor of two complainants against a defendant for the infringement of letters patent, from which the defendant appealed. After the decree, and before the appeal was taken, one of the complainants below died. It did not appear that the cause of action survived, or that there was a severance between the surviving and the representatives of the deceased plaintiff. The death of the deceased party was not suggested on the record, his representatives did not appear voluntarily, nor were they cited to appear. *Held*, that the proper course of proceeding to enable this court to obtain jurisdiction had been wholly disregarded, and that it was too late to cure the defect, more than four years having elapsed since the final decree was entered.

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IN EQUITY. The case is stated in the opinion.

Mr. John R. Bennett for appellants.

Mr. Arthur v. Briesen (with whom was *Mr. Antonio Knauth* on the brief) for appellee.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

These are appeals from final decrees rendered in the Circuit Court of the United States for the Southern District of New York, awarding to Abraham G. Jennings and Warren P. Jennings, complainants, damages against Thomas Dolan, of Philadelphia, and Kibbe, Chaffee, Shreve & Co., of New York, for the infringement of letters patent No. 218,082 for lace purling. A design patent No. 10,448 for a design for fringed lace fabric was also proceeded on in the bills of complaint, but was held not to have been infringed by defendants. Final decrees were rendered in each suit in favor of Abraham G. Jennings and Warren P. Jennings against Dolan and Kibbe *et al.*, respectively, on the 12th of February, 1887.

On the 25th of March, 1887, a petition for appeal was filed in each case on behalf of the defendants, entitled "Abraham G. Jennings, survivor of Abraham G. Jennings and Warren P. Jennings," and against Dolan and Kibbe *et al.*, and the appeals were allowed.

The bond in No. 265 was approved March 10, 1887, and entitled "A. G. Jennings, surviving complainant in A. G. Jennings and W. P. Jennings *v.* Thomas Dolan," and recited that Dolan and his sureties were "held and firmly bound unto the above-named complainants in the sum of thirty-five hundred dollars, to be paid to the said complainants." The citation ran, "to Abraham G. Jennings, surviving complainant, etc." and was served March 24, 1887.

In No. 266 the bond was entitled "A. G. Jennings, surviving complainant in A. G. Jennings and W. P. Jennings *v.* Henry R. Kibbe," and the other defendants, and recited that the persons signing were "held and firmly bound unto the above-named A. G. Jennings and W. P. Jennings in the sum of

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twenty-seven hundred dollars, to be paid to the said A. G. Jennings & W. P. Jennings." This bond was filed March 10, 1887. The citation ran to "Abraham G. Jennings, surviving complainant, etc.," and was served March 24.

The bills commenced "Abraham G. Jennings and Warren P. Jennings, doing business at the city of New York, county and State of New York, and citizens of the State of New York," and set up that Abraham G. Jennings and Warren P. Jennings were "the sole and exclusive owners" of the patents in question. It nowhere appeared from the pleadings, proofs, proceedings or decrees, that the complainants claimed to own or did own the patents as partners, though there was some evidence that there was a firm styled A. G. Jennings & Son, or A. G. Jennings & Sons, or Jennings & Co. Sundry licenses were put in evidence, describing Abraham G. Jennings and Warren P. Jennings as the owners of the patents and the granting of the licenses accordingly. The death of Warren P. Jennings was not suggested on the record by the appellants, except as the titles to the petitions for appeal and the bonds on appeal, and the directions of the citations, might be considered as such. But we understand his death after decree to be conceded. No order was procured, directed to the proper representatives of the estate of Warren P. Jennings, or notifying them of the appeal, nor have they voluntarily appeared.

The proper course of proceeding upon this subject has been wholly disregarded. Rev. Stat. § 955; Act March 3, 1875, § 9, 18 Stat. 470, c. 137; Rule 15, 108 U. S. 581. So far as disclosed by these records, the cause of action did not on the death of one of the complainants survive to the other, nor could there have been nor was there any severance between Abraham G. Jennings and the legal representatives of Warren P. Jennings; nor do we think that the defect can now be cured. More than four years have elapsed since the final decrees were entered, and as we have never had jurisdiction over the legal representatives of the deceased complainant, it is impossible for us to obtain it now.

In *Knickerbocker Life Insurance Co.* v. *Pendleton*, 115 U. S. 339, after judgment had been rendered here reversing the

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judgment below, which had passed in favor of the plaintiffs below, the court discovered that the writ of error was sued out and citation directed and served against only one of those plaintiffs, and that the preliminary appeal bond was made to him alone. The supersedeas bond was, however, executed to all the plaintiffs, and the subsequent proceedings generally bore a plural title. The special circumstances of the case were held to justify the amendment of the writ of error and the issue of a new citation.

In *Mason* v. *United States*, 136 U. S. 581, the application to amend being made more than two years after the entry of judgment, and the omitted parties being in no way in court, the application was denied and the writ of error dismissed. *Estis* v. *Trabue*, 128 U. S. 225.

We are compelled to hold the objection fatal to our jurisdiction, and the appeals must be

Dismissed.

MELLEN *v.* BUCKNER.

BUCKNER *v.* MELLEN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Nos. 13, 27. Argued November 25, 26, 1889. — Decided March 23, 1891.

M., a planter of Louisiana, died in 1860, leaving as his heirs, the minor children of his deceased daughter Julia, and the minor grandson of his deceased daughter Ann. At the death of his wife, in 1844, a large portion of the property then in his possession was community property, in which she was entitled to a half interest. Before his death he attempted, by sale and donation of specified estates, valued and appraised by him, to give to his daughter Julia (who was then living) her interest in the community property left by her mother and three-fourths of his own remaining estate; and, in a like way, to give to the grandson of his daughter Ann his like interest in the community property and the remaining one-fourth of his own estate. At his death he left similar provisions. The parties each enter[illegible] erties thus respectively assigned to th[illegible]

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Syllabus.

without interference from the testamentary executor. But in 1869 the testamentary executor of M. made a simulated sale of all the lands at the instance of one of the parties concerned. A creditor of his estate then filed a bill on behalf of himself and other creditors, to set aside this sale as fraudulent, and to subject the lands to the payment of the testator's debts; and such proceedings were had thereon that this court, at October term, 1883, decided that the sale was fraudulent in fact, and that the lands in the hands of the heirs were liable for his debts. *Johnson* v. *Waters*, 111 U. S. 640. The cause having been remanded to the Circuit Court for further proceedings and to afford other creditors an opportunity to become parties, the representatives of the heirs of Julia and of the heirs of Ann respectively presented their claims as creditors for their interest in the community property, and also filed bills in the nature of supplemental or cross bills, setting up that they were not parties to the former decree, averring the validity of the sale declared fraudulent, setting up their claims to the community property, and claiming that they should be allowed for improvements. The creditors' representative answered, that the debts for the community property had been fully paid from rents and revenues, or, if not paid, had, under the laws of Louisiana, become subordinated to the debts of ordinary creditors. Further evidence was taken in addition to that in the original cause: *Held*,

(1) That the decision in *Johnson* v. *Waters* was right as to the fraudulent character of the sale made in 1869, and that it be affirmed;

(2) That the act of sale and donation to M.'s daughter Julia, mentioned in *Johnson* v. *Waters*, was void as a donation, but valid as a sale to the extent of the consideration named therein; to wit, the debt due to her for her share in the community property, and the sum to be paid by her to the other heir;

(3) That any debt which may have been due from M. to either of his heirs on account of the community property, was more than satisfied by their respectively receiving that portion of the property which was intended by him to be a satisfaction of it, and by the rents and revenues received since his death; and that such portion in aliquot parts should be held by them free from the other debts of the estate; but that the remaining portion should be sold to pay said debts;

(4) That, being minors at the time they became heirs, they were, under the law of Louisiana, heirs with benefit of inventory, and not personally liable for the debts beyond the amount of the property which was not received in satisfaction of their own claim upon the community;

(5) That on equitable grounds they should have some allowance or consideration, beyond the use of the property, for improvements which they had placed upon it, and for restoration of its condition after floods and other devastations;

(6) That in view of the conflicting evidence and the difficulty of arriving at an accurate adjustment of equities this court would direct

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that the respective interests of the heirs be increased as indicated in the opinion;

(7) That there is nothing in the sections of the Civil Code of Louisiana, referred to in the opinion, which conflicts with these equitable conclusions.

IN EQUITY. The case is stated in the opinion.

Mr. J. Ward Gurley, Jr., and *Mr. John G. Simrall* for Mellen. *Mr. B. T. Sage* was with them on the brief.

Mr. Thomas J. Semmes for the heirs of Julia Morgan.

Mr. J. R. Beckwith for Buckner and others.

Mr. John T. Ludeling for the creditors.

MR. JUSTICE BRADLEY delivered the opinion of the court.

These cases are supplementary to that of *Johnson* v. *Waters*, 111 U. S. 640, decided by this court on appeal from the Circuit Court for the District of Louisiana in October term, 1883. In that case, William Gay, a judgment creditor of Oliver J. Morgan, deceased, to the amount of $33,250, besides interest, filed a bill on behalf of himself and all other creditors of the deceased who might come in and contribute to the expenses of the suit, to subject five certain plantations in Carroll parish, Louisiana, of which Oliver J. Morgan had died possessed, to the payment of his debts, and to set aside as fraudulent and void a pretended judicial sale of said plantations made to certain of the defendants in January, 1869. The plantations were named Albion, Wilton, Melbourne, Westland and Morgana, and they lay together, the three former (the most valuable) fronting on the Mississippi River. Oliver J. Morgan had died in October, 1860. His wife, Narcissa Deeson, had died in 1844, and a large portion of the property was community property in which she was entitled to a half interest, though some of it was acquired after her death. In 1857, in a proceeding for partition of said property in the District Court for the parish of Carroll, instituted by Oliver J. Morgan, a sale was

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ordered, and the said Oliver became purchaser of the different tracts constituting the community lands, for the sum of $362,201.80, one-half of which, after deducting an amount adjudged to said Oliver for improvements, was due to the heirs of his said wife, amounting to the sum of $134,991.40. There were two heirs, namely, Julia, the daughter of Oliver J. Morgan and his said wife, who had married, first, one Keene, by whom she had several children, and, secondly, Oliver T. Morgan, by whom she had a daughter; the other heir was Oliver H. Kellam, Junior, a grandson of Ann Morgan, deceased, another daughter of said Oliver J. Morgan and his wife who had married one Kellam, by whom she had a son Oliver, (then deceased,) who was the father of said Oliver H. Kellam, Jr. These two heirs, therefore, Julia Morgan, the daughter, and Oliver H. Kellam, Jr., the great grandson, were each entitled to one-half of the said sum of $134,991.40, making due to each the sum of $67,495.70. In the adjudication of sale by the sheriff it was expressed that Julia Morgan was present and by authority of her then husband, Oliver T. Morgan, requested that the amount due her should be left in the hands of her father; and it was also expressed in the act that the amount due to the minor, Oliver H. Kellam, Jr., was left in the hands of Oliver J. Morgan, his grandfather, to be paid to his tutrix and mother, Mrs. Melinda Kellam, when demanded.

Shortly after this sale, in March, 1858, the said Oliver J. Morgan, by an act of sale and donation, transferred, or attempted to transfer, to his daughter Julia, three-fourths of all his property, comprising the four plantations, Albion, Wilton, Westland and Morgana. The transfer was made subject to Mr. Morgan's own usufruct for life, and Julia and her husband accepted the transfer by joining in the act. The object and intent of the donor was expressed in the act as follows, to wit:

"Now, for the purpose of paying to the said Julia Morgan, wife of Oliver T. Morgan, residents of this parish, she appearing and making herself a party to this deed with the authorization of her said husband, the said sum of sixty-seven thousand four hundred and ninety-five dollars and $\frac{70}{100}$ due as aforesaid, and at the same time so to divide the entire landed estate of

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this appearer, as well that purchased by him at the sale aforesaid as all his other lands, so as to give to the said Julia Morgan, wife of said Oliver T. Morgan, three-fourths of his landed estate, and to the said Oliver H. Kellam one-fourth, in the event that said Oliver H. Kellam survives this appearer, after paying each of said heirs in lands according to the estimates put upon the portions which may be conveyed to each, this appearer makes this act of sale and donation unto the said Julia Morgan of the following lands, and for the amounts of the estimated value beyond the extinguishment of the debt aforesaid, to wit ($67,495.70), this act is a donation of the lands hereinafter described unto the said Julia Morgan and her heirs forever:" [then follows a description of the several properties transferred. The act then proceeds]: "The estimated amount of the lands hereby conveyed and donated exceeds the amount of the debt due the said Julia Morgan to the amount of two hundred and thirty-six thousand seven hundred and fifty-eight dollars and $\frac{52}{100}$ ($236,758.52). To the extent that it exceeds three-fourths of the estimated value of the entire landed estate of this appearer, after the extinguishment of the debt aforesaid, she is to pay over to the minor, Oliver H. Kellam, in the event that he survives this appearer, to wit, the sum of nine thousand five hundred and thirty-[three] dollars and seventy-two cents, it taking this amount to make up one-fourth of the lands, upon the estimate now made, intended for the said Oliver H. Kellam, in extinguishment of the debt due him; and beyond this payment of the debt, it being intended that he should have the estimated value of one-fourth of the land of this appearer; it being the intention of this appearer that the said Julia Morgan shall have beyond the portion that she would inherit as an heir all the portion that this appearer could dispose of, so that his other grandchildren may get ultimately, as near as may be, a portion equal to that which may fall to the said Oliver H. Kellam as a 'forced heir' to this appearer."

Then, after reserving the usufruct of all the lands during the donor's own life, the act sets forth with particularity the basis upon which the division of the lands was made, and the valuation of the portion allotted to each heir, as follows: —

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"Whole amount of community lands.....	$362,201 80
Lands acquired since the dissolution of the community	75,760 00
Whole amount of land.....	$437,961 80
Deduct amount due to heirs arising from sale of community lands on the 18th of January, '58. to each $67.495.70.....	134,991 40
Balance divided by four.....	$302,970 40
Portion coming to Oliver H. Kellam.....	$75,742 60
Amount due him as above.....	67,495 70
Entire interest of Oliver H. Kellam, in estimated value of lands.....	$143,238 30
Three-fourths interest for Julia Morgan.....	$227,227 80
Amount due as above.....	67,495 70
Entire interest of Julia Morgan....	$294,723 50
Value of land conveyed in this deed to Julia Morgan	$304,254 22
Deduct entire interest.....	294,723 50
Excess to be accounted as before stipulated	$9,530 72"

This estimate of the then value of the lands has never been questioned by any of the parties.

On the 1st of May, 1860, Oliver J. Morgan made his will, and, after bequeathing some personal legacies, as if apprehending that the act of donation to Julia might not be valid, he disposed of his property in substantially the same manner as he had done in said act. The following disposition was made by the will:

"Fourth, I give and bequeath unto my beloved daughter, Julia Morgan, one-half of all the residue of my estate, it being

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my intention thereby to give to her all that portion of my estate that I have a right to dispose of over and above the portions going to my forced heirs; and in the event of my said daughter Julia dying before I do, then it is my will and I do hereby bequeath unto her children, Narcissa Keene, Alexander C. Keene, William B. Keene, Morgan Keene and Julia H. Morgan, or such of them as may be living at my death, the said one-half of my entire estate as above, it being my will that my said daughter shall have, inclusive of her forced heirship, three-fourths of my entire estate, but in the event that should she die before I do, then it is my will and the express intention of this testament that those of her children who may be living at my death shall have the said three-fourths of my estate."

The testator appointed Oliver T. Morgan, his nephew and son-in-law, executor of his will, who proved the same in due course, and in November, 1860, had an inventory of the estate taken, which showed:

Real estate	$947,153 80
Slaves	196,961 00
Other personal property	38,200 00
Total	$1,182,314 80

The representatives and heirs of Oliver J. Morgan went into, or continued in, possession of his property in accordance with his will and the intent he had expressed as to the undisposed portion. The slaves were divided between them. Julia Morgan, his daughter, died before he did, in May, 1860, leaving the children named in his will, who were then minors. Her husband, Oliver T. Morgan, executor of the will, and also executor of his wife's will, took possession of the four plantations given to her, and then belonging to her children. He managed the property in their interest, being natural tutor of his own daughter, Julia H. Morgan, who was only two years old at her mother's death. Narcissa Keene, the eldest of Julia Morgan's children, and the only one of the Keene children

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that seems to have survived childhood, says that she was thirteen at her mother's death, (May 1, 1860,) and was married to Matthew F. Johnson, December 27, 1860. Henry Goodrich, nephew of Oliver J. Morgan, and at one time manager of the plantations, says that in 1861 the mansion house at Wilton was occupied by Oliver T. Morgan and Matthew F. Johnson. As stated in our former opinion, "through the management of agents, and in other ways, considerable income was derived from the lands prior to the sale which took place in 1869. The crop of 1860 was over 2500 bales of cotton, which must have produced at least $90,000 after General Morgan's death. The sum of $21,800 was recovered from the government for cotton collected under the superintendence of army officers in 1862. The defendant Buckner, being examined as a witness, states that 'Montague had charge of and cultivated Melbourne and Wilton in the year 1863, and H. B. Tebbetts had charge of some of the places during 1864 and 1865. In 1866, H. B. Tebbetts rented Wilton and Melbourne. Don't think he took Albion. He was to pay ten dollars per acre rent for all the land that he cultivated. Tebbetts promised Matt. F. Johnson and witness to pay ten dollars per acre for such land as he should cultivate on Melbourne and Wilton in 1866. The most of the land was overflowed on Melbourne in 1866, and witness don't know how much land was cultivated. Wilton was not overflowed in 1866, to his knowledge. Witness states that Tebbetts paid him $3000 for the rent of Melbourne in 1866. Don't know how much he paid Matt. F. Johnson for Wilton, but that the rent was coming to Matt. F. Johnson from Tebbetts, according to the contract. Matt. F. Johnson and Samuel L. Chambliss cultivated Wilton in 1867, together; that is to say, a portion of the place. Charles Atkins cultivated a small portion of Melbourne in 1868 as witness' agent and manager. Very little was made on the place in 1868. Witness don't remember who cultivated Wilton and Albion in 1868.'"

It thus appears that at no time, after the death of Oliver J. Morgan, except as they may have been interrupted by the presence and depredations of troops during the war, did his.

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heirs cease to occupy and enjoy his property; but always in separate parcels; Oliver T. Morgan and Matthew F. Johnson, for the heirs of Julia Morgan, occupying the Albion, Wilton and two outlying plantations, and Buckner, for the Kellam heirs, occupying Melbourne. And this condition of things continued until the receiver in the Gay suit took possession of the property at the end of 1884. Oliver T. Morgan died in August, 1873, and from that time, or before, Matthew F. Johnson seems to have acted as the head of that branch of the family in behalf of his wife and as tutor of her sister, Julia H. Morgan. Henry Goodrich, nephew of Oliver J. Morgan, says that he took charge, as manager, of Wilton and Albion plantations "in behalf of the heirs" in December, 1868, and continued in charge until about April, 1873, when he was succeeded by C. M. Tilford in behalf of the same parties. Tilford says that he became manager and agent of Wilton and Albion plantations for Matthew F. Johnson in February, 1873; that the contracts made by him with the laborers were in the name of "Matthew F. Johnson, tutor for the minor children of Julia Morgan;" and that he continued agent for 1873, 1874 and 1875, when he was succeeded by J. W. Erwin. Erwin states that he came to take charge of the Wilton and Albion plantations in behalf of "Matthew F. Johnson, and the heirs of Julia Morgan," and had continued in charge until the time of giving his testimony. These witnesses were examined in March, 1878; and it is clear that if the character of executor or dative executor was ever assumed by Oliver T. Morgan, or Matthew F. Johnson, it was a mere matter of form, and that they really possessed and managed the property for the heirs. The will was substantially and in effect carried out in this respect.

As to the interest of the other heir, Oliver H. Kellam, Jr., that was managed by his mother, Melinda Kellam, as his natural tutrix, and her second husband, John A. Buckner, whom she married in April, 1859. They continued in possession of the Melbourne plantation, one of the most valuable in the lot, representing the heir, just as Oliver J. Morgan had intended they should do. There is no doubt that (with the

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$9530.72 payable by Julia) the value of that plantation, at that time, was abundantly equal to the amount due to Oliver H. Kellam, Jr., ($67,495.70;) and, in addition thereto, equal to the one-fourth part of Oliver J. Morgan's proper estate of which said Kellam was forced heir. It was so estimated by Mr. Morgan himself, and, as the subsequent inventory showed, the estimate was a low one; and the parties interested acquiesced in it.

As things then stood, therefore, the estate was liable and subject, in the hands of the heirs and executor, to the debts of Oliver J. Morgan, except such portions thereof as were received by the heirs in payment of the debts due to them on account of his wife's interest in the community property. The portion so received by Julia Morgan's heirs was valued at $67,495.70, due to her, and $9530.72, to be paid by her to Oliver H. Kellam, Jr., in all $77,026.42 out of the $304,254.22 worth of lands allotted to her, or $25\frac{32}{100}$ per cent of those lands. The portion so received by Oliver H. Kellam, Jr., or those acting for him, was valued at $67,495.70 due to him, less the sum of $9530.72 to be received from Julia's heirs; which would leave $57,964.98 out of $133,707.58,[1] the valuation placed on the Melbourne plantation; or $43\frac{35}{100}$ per cent of that plantation. These portions of the lands respectively received by the heirs by way of payment were justly free from the claims of Oliver J. Morgan's creditors, supposing them not to have been personally liable, (being minors,) by reason of the portions received by them respectively as heirs or legatees. This was substantially the view which we entertained, though not fully expressed, in the case of *Johnson* v. *Waters*.

We held in that case that the act of sale and donation made by Oliver J. Morgan to his daughter Julia in March, 1858, was void as a donation; and that if it could be held good as a sale it could only be for the part which went to pay her the amount due from her mother's estate, together with the amount she was directed to pay to Oliver H. Kellam, Jr.; but whether good as a sale in part we did not then decide, though inclined

[1] This sum is obtained thus: $143,238.30 less $9530.72 = $133,707.58.

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to think that it was. The court below seems to be of opinion that it was not. But we have seen nothing to change the impression which we then had; especially as the donor expressly declared in the act itself that he intended it as a sale in part and a donation in part; a sale to the extent of the amount due his said daughter, and a donation as to the residue. This view makes still stronger the position that the part which was received by way of sale was free from the debts of Oliver J. Morgan. We have given careful attention to the argument made on behalf of the heirs of Julia Morgan in favor of the validity of the donation, but adhere to our former view on that subject. It is unnecessary to go over the subject again. Counsel is mistaken in supposing that any importance was attached to the designation of the consideration of that act as a "charge." In that regard we only held that, even if it was a charge, it was not sufficient in amount to make the donation an onerous one.

That Julia Morgan and her heirs were concluded by the dispositions made by her father seems clear; for she and her husband joined in the act of donation and sale, and the will did not change the destination of the estate. It is contended, however, that Oliver H. Kellam, Jr., being then an infant, and not represented in the judicial proceedings taken, or in the acts executed by Oliver J. Morgan, was not bound thereby. Even if that were so, we do not see that the position of things would be substantially changed. The fact was that Mr. Morgan's arrangements had long been in contemplation and had been partially carried out before his death. He had put the Kellams in possession of the Melbourne plantation several years before, and intended that plantation as going to make up their share of the whole estate; and his daughter Julia and her family lived with himself, and her husband had special charge and possession of Westland, (if not of Morgana,) and came into possession of all except Melbourne on Mr. Morgan's death. After that, both parties continued in possession in accordance with the disposition made by him. Each heir had the portion intended for him or her, and if the debt which he formally incurred to them for his wife's community property

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was not technically paid, nevertheless they received that identical property in specie in the shape of the lands which were allotted to them. The proceedings instituted by Mr. Morgan for obtaining his wife's interest in the community property were more of a transaction on paper than a real one, and produced no change in the devolution of the estate. The heirs obtained all that they would have been entitled to in any event; and whether they received the portion coming from their ancestor, Narcissa Deeson, by way of inheritance from her, or by way of payment for that inheritance, it all came to the same thing in an equitable point of view. In either case they were entitled to hold it free from the debts of Oliver J. Morgan, and had no claim as creditors against his other property. The attempt now to set up those debts, or either of them, for the purpose of defeating the just claims of the real creditors is clearly inequitable. This was our view in the former case, and it is not changed by anything that has been shown in the cases now under consideration.

The bill in the case of *Johnson* v. *Waters* was specially directed to set aside as fraudulent and void a pretended sale of all the lands of Oliver J. Morgan, made in January, 1869. John A. Buckner, one of the plaintiffs in the present case, had applied to the parish court of Carroll parish for a sale of all of said lands to pay the debts of the estate, and particularly the pretended debt of $67,495.70, due to his daughter Mollie Buckner as heir of Oliver H. Kellam, Jr., alleging that it was a judgment debt, and had a preference over other claims; and Oliver T. Morgan, as executor, intervened in the petition in aid thereof. An order of sale was accordingly made, a sale followed, and John A. Buckner became the purchaser of the Melbourne, Wilton and Albion plantations, at three dollars per acre; and the other two plantations were sold for the same price, one to J. W. Montgomery, one of the lawyers in the case, and the other to F. M. Goodrich, another of the lawyers therein. The facts with regard to this transaction are fully stated in the opinion in *Johnson* v. *Waters*, 111 U. S. 655, 669. Suffice it to say, that we were satisfied from the evidence that the sale and all the proceedings that resulted in the sale were

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fraudulent in fact, and conceived and carried out for the sole purpose of defrauding the real creditors of Oliver J. Morgan, deceased, and of getting in the title for the benefit of the heirs without paying any of the debts. We accordingly concurred with the Circuit Court in setting aside the said sale as fraudulent and void for fraud in fact; and not on the ground, as, in the bill of complaint in one of the present cases, is ingeniously, if not ingenuously, surmised, that the fraud consisted in Buckner's pretending to be, as tutor of his daughter, a creditor of the succession of Oliver J. Morgan for the sum of $67,495.70 with preference; though the setting up of that debt in the manner in which it was done was one of the means employed for carrying out said fraud. The evidence on this subject is quite fully set forth in the opinion in *Johnson* v. *Waters*, and need not be further adverted to. It is all introduced in the present cases by stipulation, and we find nothing in the evidence taken in these cases to alter our opinion. It is unnecessary to notice the pretended judgment of Buckner, as tutor of Oliver H. Kellam, Jr., against the estate of the latter, as it can have no effect on the rights of the parties in these suits, being, in any event, subordinate to the claims of Oliver J. Morgan's creditors. The assertion in the brief of counsel that said judgment was the debt sought to be recovered by the probate proceedings and sale in 1868–9 is contradicted by Buckner himself in his bill filed in these cases.

Our conclusion and decree then were:

1st. That the debt of Gay, the complainant, as represented by his administrator, Waters, (now by Mellen, administrator *de bonis non*,) be established and confirmed.

2d. That the sales complained of, made in January, 1869, be declared null and void, as against the estate of Gay and the other creditors of Oliver J. Morgan, deceased; and that it be referred to a master to take and state an account of the assets belonging to said Morgan's estate in the hands of the dative testamentary executor, Matthew F. Johnson, one of the defendants; and to give notice to creditors to come in and prove their debts.

3d. That if other assets were not sufficient to pay such

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debts, the master should sell so much of the said lands as might be necessary to pay them; dividing the proceeds *pro rata* if not sufficient to pay all the creditors whose debts should be established, after paying all the complainants' costs.

4th. That the master might apply for instructions, especially as to whether the succession of Julia Morgan was entitled to any portion of the proceeds arising from the sale of the lands, by virtue of said act of donation and sale made to her by Oliver J. Morgan in 1858. so far as said act was a sale and not a donation.

The cause was remanded to the Circuit Court, a reference was ordered according to the decree, and the matter was opened before the master. On this reference the heirs of Julia Morgan and Buckner as representative of the Kellam interest presented each their claim for $67,495.70, and interest, as a debt against the estate of Oliver J. Morgan, deceased, as if the reference included them and was intended for their benefit, as creditors of his estate. But said claim was presented with reservation of rights to be set forth in the bills now before us, which they proposed to file.

Thereupon they filed the bills in the two cases now here on appeal.

One of the bills is filed by John A. Buckner for himself and as tutor of his minor child, Etheline Buckner, in the nature of a cross-bill against Stephenson Waters, (for whom Delos C Mellen has been substituted,) administrator, etc., of William Gay, deceased; and is in fact, as it is styled, a bill in the nature of a cross-bill to the said suit of Gay referred to as *Johnson* v. *Waters*. By a strange fatality in the course of events, Buckner and his daughter, the present representatives of Ann Kellam, (née Morgan,) and of her grandson, Oliver H. Kellam, Jr., have not a particle of Morgan or Kellam blood. Oliver H. Kellam, Jr., the last of that line, died young, leaving as his heirs his mother, Melinda Kellam, and his half brother and sister, children of his mother by John A. Buckner. The mother and brother dying, the sister Louise (or Mollie) and her father Buckner became the heirs. Louise dying, left her father, Buckner, and her half sister by a second wife of Buck

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ner, her heirs. So that the succession of the Morgan-Kellam line has come to be represented by entire strangers.

The other bill is filed by Narcissa Keene, wife of Matthew F. Johnson, and Julia H. Morgan, wife of George G. Johnson, their husbands joining for the sake of conformity. It is filed as an original bill in the nature of a supplemental bill and cross-bill, against Stephenson Waters, (for whom Delos C. Mellen has been substituted,) administrator, etc., of William Gay, deceased. Narcissa K. Johnson is the only survivor of the Keene children of Julia Morgan, and Julia H. Johnson is the daughter of Julia Morgan by her second husband, Oliver T. Morgan.

The frame of the two bills is substantially the same. They first assert that the complainants, in their character of heirs and representatives of Ann Kellam and Julia Morgan respectively, were not parties to the suit of *Johnson* v. *Waters*, and are not bound by the decree therein. This averment is in a measure true. That suit was brought against Oliver T. Morgan, the executor of Oliver J. Morgan, (who made the fraudulent sale complained of,) and John A. Buckner, J. West Montgomery, and Ferdinand M. Goodrich, the purchasers at that sale. Whilst this is so, it is also true that the real controversy in the whole case was stoutly litigated. Buckner, one of the present complainants, was the principal and most interested defendant; and Oliver T. Morgan was the executor both of Oliver J. Morgan and his own wife, Julia Morgan. The bills then go on to give the history of the estate of Oliver J. Morgan, and Nancy Deeson's community interest, the sale of that interest to Morgan, the act of donation and sale to Julia Morgan, etc., referring to the printed record in *Johnson* v. *Waters* for the copy of the act. Buckner, in his bill, claims that the Melbourne plantation, when given to the Kellams, was uncleared and unimproved, and the ancestor of Oliver H. Kellam, Jr., cleared and improved it, and the Kellams always treated it as their own property, with the assent of Oliver J. Morgan. He refers to the proceedings in the parish court in 1868–9, and the sale in January, 1869, as prosecuted in good faith, and free from any fraudulent intent; but he admits that this court set aside the

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said sale as fraudulent, and avers (though untruly) that the court declared that the fraud consisted in Buckner's pretending to be (as tutor) a creditor of the succession of O. J. Morgan for $67,495.70, with preference, when, in reality and in equity, there was no such thing as a debt due from him to his grandson, because the giving and setting apart of Melbourne plantation to the Kellams was intended to be in satisfaction of their rights in the succession of Narcissa Deeson, and in point of fact the succession of O. J. Morgan owed no debt to Oliver H. Kellam, Jr. Adopting this version of the decree of this court, Buckner says that he is well satisfied to accept said plantation on that basis, and abandon all claim as creditor of O. J. Morgan, and offers to do so on the rendition of a decree recognizing him and his child, Etheline, as owners of said plantation, and prays for such a decree. Otherwise he claims one-half of the community property in conjunction with Julia Morgan's heirs. He mentions having presented his claim for $67,495.70 before the master, with a reservation; and submits his rights to the court.

He alleges that such are the complications of the rights of the heirs in consequence of the action of Oliver J. Morgan, and his representatives, and the creditors, that the aid of the court is necessary to adjust the rights of all the parties, and hence he files his bill for its direction in the premises and for the protection of his rights and those of his child, Etheline.

The bill of Narcissa K. Johnson and Julia H. Johnson is similar to that of Buckner, and prays similar relief.

The defendant Waters, administrator of Gay, filed answers to these bills, in which he takes the ground that the plantations in question became the sole property of Oliver J. Morgan by virtue of his purchase of the same in 1858, at the sale of the community property; but that the debt incurred for such purchase has been fully paid to the heirs by their reception and enjoyment of the revenues and profits of the lands; that they went into possession of said lands as heirs of Oliver J. Morgan without benefit of inventory, and thus became personally liable for all his debts; and that if the debts due to them have not been fully paid, they have at least become subordinate and

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inferior to the debt due to the defendant, and have also become prescribed by lapse of time; and they plead the prescription of three, five and ten years.

On the 5th of March, 1885, the solicitors of the respective parties entered into a written agreement that the two causes should be consolidated and tried together, and considered as if the complainants in each had been made defendants in the other, and that Matthew F. Johnson, in his capacity of dative testamentary executor of Oliver J. Morgan, should appear and become a party; and that the bill in each case should be treated as an answer in the other case. Johnson appeared accordingly as dative testamentary executor, and filed a paper admitting the facts set forth in the bills of complaint.

In July, 1885, the following stipulation, agreed to by the solicitors of the parties, was entered into in the consolidated case:

"The parties, by their solicitors, for the purpose of avoiding delay and expense, and of bringing these causes to a speedy trial, stipulate as follows:

"1st. The answers filed in these causes, before consolidation, shall be taken and considered as the answers to the consolidated causes, and apply to new parties introduced since they were filed as well as to those then parties.

"2d. The causes shall be considered at issue as if replications had been filed, and no further replications than the provisions of this agreement shall be necessary.

"3d. A copy of the record in cause 6612, referred to in the pleadings in these causes, and numbered 297 on the docket of the Supreme Court of the United States, as the same was printed for use in the Supreme Court of the United States, shall be filed in evidence." [This is the record in *Johnson* v. *Waters*.] "All documents copied therein shall be taken and considered as if they were separately authenticated by the proper officer and without other evidence of their authenticity than the fact that they are found in said printed record.

"It is not intended by this agreement to waive any legal objection to the introduction in evidence of any document or depositions printed in said record which might or could be

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made to the original depositions if produced and offered, objections as to form being waived.

"4th. The judgment and decree of the Supreme Court of the United States in said cause 6612, (297 of that court,) as the same is printed in Vol. 111 of the printed reports, may be used in evidence without further proof or the production of a certified copy thereof; but this agreement, in this respect, is intended to waive form only and not any objection to the admissibility in evidence of said decree on other grounds, nor to its effect when introduced in evidence."

The parties thereupon took further evidence. A certificate of the clerk of the District Court for the parish of Carroll, custodian of its probate and succession records, showed that Oliver T. Morgan, executor of the succession of Oliver J. Morgan, never filed or rendered any account of his administration of said succession, except one purporting to be a final account, filed 8th February, 1870; and as executor of Julia Morgan, never filed or rendered any account whatever; and that Matthew F. Johnson, dative testamentary executor of the succession of Oliver J. Morgan, never filed or rendered any account, or any bond. The final account of Oliver T. Morgan, referred to by the clerk, was a mere perfunctory one, exhibiting an exact balance of receipts and disbursements; the receipts consisting of the bids for the property at the fraudulent sale of January, 1869, and the disbursements, consisting of credits on the pretended claims of the bidders, Buckner and the lawyers and certain creditors whom they professed to represent. The truth is, as before intimated, that there never was any *bona fide* administration of the estate; but each of the two sets of heirs, or their tutors for them, took and kept possession of the respective portions of the real property intended for them by Oliver J. Morgan, and divided between themselves and took possession of the slaves and other property of the estate. The complainants, Narcissa K. Johnson and Julia H. Johnson, testifying as witnesses in the case, allege that they never received anything from the estate. But this is hardly consistent with the fact that Oliver T. Morgan, the father of one of them, and step-father of the other, lived with them on the

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property, and on his death Matthew F. Johnson, the husband of Narcissa, was appointed dative testamentary executor, and in that nominal capacity had control of all the property not occupied by Buckner or by the lawyers who bid off the Westland and Morgana plantations, until the said Julia married, when she and her husband, George G. Johnson, were put into possession of a portion of it. They have lived on the property as their own, and have received and enjoyed whatever it was capable of yielding. This is shown by the testimony of Goodrich, Tilford and Erwin, before referred to, and there is much more evidence in the case to the same purport.

The same thing is true with regard to the occupation of Melbourne by the Kellam branch of the family, namely, by Oliver H. Kellam, Jr., with his mother and natural tutrix, and by John A. Buckner and his children. The only pretension of their being unpaid creditors of the succession was made as a part of that fraudulent scheme which resulted in the sale of January, 1869, which we have already decreed to be void, and with regard to which we still hold the same opinion.

The testimony of John A. Buckner himself, taken in the original cause, substantially corroborates this view of the case. In addition to what has already been quoted from his examination, he then said:

"Witness says that he has never had corporeal possession of Wilton or Albion plantations. Since the war Matt. F. Johnson has had the actual control and management of Wilton and Albion plantations, as he, witness, supposed, in interest of his wife, one of the heirs, and the other heirs of Julia Morgan. Matt. F. Johnson and the heirs of Julia Morgan have never set up any adverse claim to witness in regard to Melbourne plantation.

"They have confined their pretensions to Wilton and Albion, and have had the control of said plantations ever since the war, though Oliver T. Morgan, as executor, has exercised some authority over the property. . . .

"Matt. F. Johnson, in behalf, as witness supposes, of the heirs of Julia Morgan, has exercised full control over the property and leased and controlled the property and exercised the

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rights of ownership over the same ever since the war, except that Oliver T. Morgan, executor, exercised authority several years after the war. . . .

"Witness says that the heirs of Julia Morgan have always claimed a greater share of the property than they considered him entitled to, as representing one of the heirships. There were two heirships to Judge Morgan's estate. One witness represents, and the other the heirs of Julia Morgan represent.

"The following question is propounded by counsel for complainant: — In the distribution of the property among the heirs of Oliver J. Morgan, wherein the heirs of Julia Morgan took Wilton and Albion and restricted witness, representing another heirship, to Melbourne, why did the heirs require such an unequal division? Was it or not on account of the extraordinary pretensions they set up as heirs of Julia Morgan, or why was it?

"Witness says it was because they claimed three-fourths of the estate. He does not know upon what their claim is based. Witness refers counsel to the records; says that there has been no final division between the heirs. *The heirs of Julia Morgan have held possession of the land they had before the war, and witness has held possession of the land he had before the war.* Witness does not hold the property in common; there is only a temporary division.

"Witness has held possession of Melbourne ever since the war, and the heirs of Julia Morgan have held possession of Wilton and Albion, except that the heirs recognized Oliver T. Morgan as executor, but he did not require of them any account of the rents and revenues.

"Witness says that his understanding was at the time of the sale, in January, 1869, when he bought in the property for the heirs, that they were to receive their proportion of the land purchased in witness' name, and he was to retain his proportion.

"They were (the heirs of Julia Morgan) to take three-fourths of the land and witness one-fourth, and this understanding was had as to the exact amount in the division after the sale. There was no conversation or agreement with the heirs, or any other parties, as to how the division should be made."

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Buckner was reëxamined in the present cases, and states still more explicitly the fact that the Melbourne plantation was possessed and operated by him in the interest of the Kellam heirs, including his own children. He says:

"I married Mrs. Melinda Kellam, April 7th, 1859. Her son, Oliver H. Kellam, died in September, 1863. He was seven years old at the time of his death. My wife, Mrs. Melinda Kellam, died in September, 1863. My son John died one week afterwards. He was three years old at the time of his death. My daughter Louisa (called Mollie) died in March, 1883, and was 21 years and 6 months old at the time of her death. . . .

"Melbourne plantation was first set apart and given by Oliver J. Morgan to the ancestor of his great grandson, Oliver H. Kellam, (the son of my first wife,) in 1853. . . .

"The Kellams cultivated it as their own; had their own merchant, raised their own money with which to improve and plant the place, and were never called to account for rents or revenues, and never did so account for them, either to Judge Morgan or to any one else.

"It was in the possession of my wife, Mrs. Melinda Kellam, as natural tutrix, and myself, as cotutor to the minor, Oliver H. Kellam, at the time of the death of Oliver J. Morgan. The said plantation remained in the continuous possession of the Kellams or their representatives from the time it was originally given or set apart to them by Oliver J. Morgan until dispossessed by the receiver appointed by the court in suit No. 6612."

This was on his cross-examination. On his direct examination he had said:

"Oliver J. Morgan died in the spring of 1860. Upon his death the Melbourne plantation was claimed by and was in the possession of (as it had been for many years before) the Kellam heir. The other places were claimed by the heirs of Julia Morgan, but the executor took possession or control, and exercised authority over all but Melbourne. There was a change in 1869; after the succession sale took place Morgana was controlled by F. M. Goodrich, until he transferred it to

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Samuel Boyd, of New Orleans, who had possession until 1st January, 1885.

"Westland after 1869 went under the control of some of the creditors of O. J. Morgan, and remained so until 1st Jan., 1885, and Col. Matt. Johnson controlled Wilton and Albion until about 1879, when Mr. Geo. Johnson took control of the lower part of Wilton and Albion.

"How much was controlled by the latter I do not know, and these two places remained under their control until 1st Jan., 1885.

"*As to Melbourne, it has never passed out of the representative of the Kellam interest.*"

The pretence that the Melbourne plantation was intended as a pure gift by Oliver J. Morgan to the Kellam family cannot be seriously maintained in view of the express declarations and provisions to the contrary made by Mr. Morgan in his lifetime; and is contradicted by the conduct of Buckner himself, in procuring Melbourne to be sold as part of the property of Oliver J. Morgan, at the sale of January, 1869, and becoming the purchaser himself, and filing a petition for homologation in which he expressly declares that it belonged to the estate of Oliver J. Morgan, deceased.

In addition to the evidence taken in the former case, further evidence has been taken in the present cases, as to the rental value of the property from the time of Oliver J. Morgan's death, and the value of the fruits and revenues which have been derived from it; and in this connection the complainants have adduced evidence to show that they have been at large expenses for repairs and for restoration of the lands after floods. We have carefully examined the evidence on these points, both that which has been adduced in the present suits and that which was taken in the case of *Johnson* v. *Waters*, and, without attempting to give an abstract of it, we shall only state our conclusion, which is substantially the same as that at which we arrived in that case, namely, that any debt which may have been due from Oliver J. Morgan to his heirs was more than satisfied by their receiving that portion of the property which was intended by him as a satisfaction, and by the

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rents and revenues received since his death. Though heirs with benefit of inventory, (being for the most part minors at the time of their becoming such,) they were nevertheless chargeable, as against any claims of their own, for what the estate was worth when the succession commenced; and that far exceeded the amount of such claims. *Changeur* v. *Gravier*, 4 Martin, N. S. 68.

We think, however, that it would be proper, not as a matter of strict right, but on equitable grounds, that they should have some allowance or consideration, beyond the use of the property, for improvements which they have placed upon it, and for restoration of its condition after floods and other devastations. But, in view of the conflicting evidence as to the annual value of the lands, since Oliver J. Morgan's death, and the great lapse of time that has occurred, it would be difficult, if not impossible, to arrive at any precise and accurate adjustment of the equities arising out of all the complications of the case; and the creditors might well say that their claims should have been satisfied when the estate was abundantly able to pay them, and before the restorations were necessary. The best that can be done, with a view to the interest of all the parties, and the termination of a vexatious litigation, is to make such award and decree as, on the whole, seems most equitable and just. With this view, we see no better disposition to be made than to increase somewhat the percentage of interest in the lands to be reserved to the complainants, and to order a division of the lands to be made, if they shall so desire. This will enable each party to obtain and secure his, or their, own rights without sacrificing those of the others. To allow the complainants to go before the master in the Gay suit, and prove their antiquated claims, principal and interest, would enable them to sweep away nearly all the property, and leave the creditors nothing. This certainly would be most inequitable. Whilst to allow the creditors to sell the whole property in order to raise the amount of their debts would be equally inequitable, for it would leave nothing for the heirs, who have a meritorious claim arising from the interest of their ancestor, Narcissa Deeson. We think it is admissible and,

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under all the circumstances of the case, would be just, to increase the interest to be reserved to the heirs of Julia Morgan in the four plantations allotted to them, from $25\frac{82}{100}$ per cent to forty per cent or two-fifths, and to increase the interest to be reserved to the heirs of Oliver H. Kellam, Jr., in the Melbourne plantation from $43\frac{35}{100}$ per cent to fifty per cent, or one-half. And in setting off to them their separate portions respectively as thus defined, if they shall desire the same to be so set off, any permanent buildings which they may have erected on said portions should not be added to the value of the lands thus assigned to them, in making the division between them and the creditors. The remainder of the lands should be sold for the benefit of Gay's administrator and the other creditors who shall have established their claims before the master in the original suit, not including the complainants. If the heirs should not desire to have their portions set off separately, then the whole property is to be sold, and they are to receive their proportional share of the proceeds, but no allowance for buildings. If any moneys remain in the hands of the receiver beyond the expenses incurred by him and his proper compensation, they should be divided between the creditors and heirs in the proportions above stated; and the portion due to the heirs should be applied, as far as requisite, to the payment of the costs awarded against them.

We have thus far expressed our views of the equities and legal aspects of the case without referring to particular laws or decisions. But, it is proper to add, that, besides other portions of the Civil Code of Louisiana, the following articles have been constantly borne in mind:

Art. 254. "If a mother who is tutrix to her children, wishes to marry again, she must, previous to the celebration of the marriage, apply to the judge in order to have a meeting of the family called for the purpose of deciding whether she shall remain tutrix." . . .

Art. 255. "When the family meeting shall retain the mother in the tutorship, her second husband becomes of necessity the cotutor, who, for the administration of the property, subsequently to his marriage, becomes bound *in solido* with his wife."

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We assume that the due formalities were observed with regard to the tutorship of the minor heirs who from time to time became interested in the property of Oliver J. Morgan. This presumption is the most favorable to the parties, and should be made unless the contrary appears.

Art. 352. "It shall not be necessary for minor heirs to make any formal acceptance of a succession that may fall to them, but such acceptance shall be considered as made for them with benefit of inventory by operation of law, and shall in all respects have the force and effect of formal acceptance."

Art. 1032. "The benefit of inventory is the privilege which the heir obtains of being liable for the charges and debts of the succession only to the value of the effects of the succession, by causing an inventory of those effects to be made within the time and in the manner hereinafter prescribed."

The heir with benefit of inventory is bound only to the amount the estate was worth at his ancestor's death. Of course he is bound to that extent. *Changeur* v. *Gravier*, 4 Martin N. S. 68.

Art. 1054. "The effect of the benefit of inventory is that it gives the heir the advantage:

"1. Of being discharged from the debts of the succession by abandoning all the assets of the succession to the creditors and legatees.

"2. Of not confounding his own effects with those of the succession, and of preserving against it the right of claiming the debts due from it."

In the present case the heirs did not abandon the assets of the succession to the creditors, and the debts due to them from the estate were satisfied in the manner hereinbefore stated. The portion of the property received in satisfaction we propose shall be set off to them in severalty, if they shall desire it, so that it may not be confounded with the residue.

Art. 1058. "But if the heir declares that he is not willing to accept the succession otherwise than with the benefit of an inventory, the person appointed administrator of the estate, whether it was the heir himself or any other individual, shall proceed to the sale of the property of the succession and to

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the settlement of its affairs, as prescribed in the following articles: The beneficiary heir shall, at the time of such settlement, have a right to be paid, as any other creditor, all debts due him by the deceased, and shall, moreover, be entitled to the balance of the proceeds of the sale of the estate, if any such balance be left after the payment of all the debts and charges of the succession."

As the debts due to the heirs in the present case were satisfied and paid by the property received for that purpose, this article has no special bearing upon the result.

The question arising from the incapacity of minor heirs has already been adverted to.

Upon the final hearing of the cases as consolidated, the court below, on the 15th of June, 1886, made the following decree, to wit:

"These consolidated causes came on to be heard at this term on final hearing and were argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed by the court that the bills of complaint of the complainants, John A. Buckner and others and Narcissa Keene, wife of Matt. F. Johnson, and others, be dismissed, reserving the right to said complainants, except said Buckner in his own right, to go before the master appointed in the case of *Waters, Adm'r*, v. *Johnson et al.*, No. 6612 of the docket of this court, and prove up as ordinary claims against the estate of Oliver J. Morgan such sums as may be due them on account of the original indebtedness of Oliver J. Morgan to the heirs of Narcissa Deeson, which indebtedness is hereby recognized as originally $134,991.40, provided said complainants shall account for said property, rents and revenues of the said estate of Oliver J. Morgan as came to their hands as heirs or grantees of said Oliver J. Morgan, and it is ordered that said complainants do pay all the costs of the suit, said costs to be equally divided between the complainants in the two causes respectively."

On a full consideration of the case, we think that this decree should be reversed, and that a new and different decree should be made. Instead of dismissing the bills of the complainants, we think that those bills, being in the nature of cross-bills in

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the suit of Waters, (now Mellen,) administrator of Gay, against the executor of Morgan and others, should be retained and consolidated with that suit; and instead of reserving to the complainants in the present suits the right to go before the master in that case and prove their claims against the estate of Oliver J. Morgan for any supposed indebtedness due to them as heirs of Narcissa Deeson, (which indebtedness should be declared to be paid and satisfied,) a certain portion of the said plantations and real estate of Oliver J. Morgan, before referred to, should be reserved to them free from the claims of the creditors of said Morgan; that is to say, two-fifths of the four plantations, Albion, Wilton, Westland and Morgana, should be reserved for the benefit of the heirs of Julia Morgan, deceased, and one-half of the Melbourne plantation should be reserved for the benefit of the heirs of Oliver H. Kellam, Jr., deceased; and the remaining interest in the said plantations should be subjected to the payment and satisfaction of the debt due to said administrator of William Gay, deceased, and the debts of other creditors of Oliver J. Morgan who may have established their claims before the master in said Gay's suit in pursuance of the decree therein, not including any pretended claim or claims of the said Morgan's heirs. And the said portions so to be appropriated to the said heirs respectively, should be divided and set off to them in severalty, if they so desire, without charging them with the value of any permanent buildings erected by them on such portions. And a decree should be made for the sale of all remaining property in convenient parcels, and for an appropriation of the proceeds among the creditors as above stated. But if the heirs do not desire a severance of their portions, the whole to be sold, and they to receive their respective portions of the proceeds, but no allowance for buildings. In carrying out the said directions, if the heirs shall desire their portions to be set off in severalty, they may designate any buildings erected by them which they wish to retain, and the portion set off to them shall include said buildings, if it can be done without prejudice to the other parts; and in that case the value of such buildings shall not be included in the aggregate valuation of the land, nor charged

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to the heirs in the valuation of the portion so set off to them with said buildings. And such decree should be made as the decree in the present consolidated case, and as a supplemental decree in the principal case, to which the present is related as by cross-bill.

Each party should pay their own costs on this appeal, except the costs of printing the record, which should be equally divided between the two parties, appellants and appellees. The costs in the court below up to this time should be paid by the complainants, as directed in the decree of the Circuit Court.

The cause is remanded to the court below with directions to proceed in conformity with this opinion.

Decree.

It is now here ordered and decreed that the said decree of the Circuit Court be reversed, and that a new and different decree be made in this consolidated case, and by way of supplement to the decree in the principal case of William Gay's administrator against Matthew F. Johnson, dative testamentary executor of Oliver J. Morgan, and others, that is to say, it is ordered and decreed that the bills filed by the complainants in the causes herein consolidated be retained, and the cases consolidated with the said principal case of Gay's administrator against Morgan's dative testamentary executor and others; but that all relief prayed in and by said bills filed in the present cases be denied except as herein declared, namely: it is decreed that instead of reserving to the said complainants the right to go before the master in said suit of Gay's administrator, and to prove their claims against the estate of said Oliver J. Morgan, deceased, for any supposed indebtedness to them as heirs of Narcissa Deeson, the said claims are hereby declared to be satisfied and paid; and that in place of said supposed claims the said heirs are entitled to have and retain a certain portion of said Oliver J. Morgan's estate free from the claims of his creditors, as follows, to wit: two-fifths of the four plantations, Albion, Wilton, Westland and Morgana, are directed and decreed to be reserved for the

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benefit of the heirs of Julia Morgan, deceased; and one-half of Melbourne plantation is directed and decreed to be reserved for the benefit of the heirs of Oliver H. Kellam, Jr., deceased; and that the remaining interest in the said plantations is decreed and adjudged to be subject to the payment and satisfaction of the debts due to the administrator of said William Gay, deceased, and to the other creditors who shall have established their debts before the master in said Gay's suit, not including the complainants in this consolidated cause; and it is further decreed that the portions so to be appropriated to said heirs respectively be set off to them in severalty, if they shall so desire, without charging them for the value of any permanent buildings erected by them thereon; and that all the remaining portions of said plantations be sold in convenient parcels, and the proceeds appropriated to the creditors as above stated. And power is reserved to the court below to appoint commissioners to make division of said property in the proportions above named before said sale shall take place. But if the heirs shall not desire a severance of their portions, then the whole property to be sold, and they to receive their respective portions of the proceeds, but no allowance for buildings. Any moneys in the hands of the receiver, after paying his expenses and compensation, are to be divided between the creditors and heirs in the proportions above stated, applying the amount due to the heirs, so far as may be requisite, to the costs payable by them. In carrying out the said directions, if the heirs shall desire their portions to be set off in severalty, they may designate any buildings erected by them which they wish to retain, and the portion set off to them shall include said buildings, if it can be done without prejudice to the other parts; and in that case the value of such buildings shall not be included in the aggregate valuation of the land, nor charged to the heirs in the valuation of the portion so set off to them with said buildings. It is further decreed that each party shall pay their own costs on these appeals, except the cost of printing the record, which shall be equally divided. It is also decreed that the costs in the Circuit Court up to the present time be paid by the complainants as directed in the decree appealed

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from. It is further decreed that the cause be remanded with directions to the Circuit Court for the Eastern District of Louisiana to enter a decree in conformity herewith, and to proceed in accordance with the opinion of this court herewith filed.

MR. JUSTICE BREWER and MR. JUSTICE BROWN were not members of the court when this case was argued, and took no part in the decision.

HANDLEY v. STUTZ.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 1516. Submitted January 12, 1891. — Decided March 30, 1891.

The failure to enter a vote of stockholders in a corporation in the corporation records at the time when it was adopted does not affect its validity.

A resolution of stockholders in a corporation organized under the laws of Kentucky to increase the capital stock of the corporation, passed at a meeting held without the limits of that State, is binding upon the members present and voting for it.

An increase by a Kentucky corporation of its capital stock within the amount authorized by law is not invalidated by reason of the fact that no amendment of the charter authorizing such increase was ever recorded or published as required by the laws of that State.

When a stockholder in a corporation who assents to an increase in the capital stock of the corporation and its gratuitous distribution among the shareholders, receives such stock as full paid stock, an obligation arises to pay for it in full, when called upon to do so by creditors whose debts are subsequent to the authorization of the increase: but this equity does not exist in favor of a creditor whose debt was contracted prior to such authorization.

An active corporation, finding its original capital impaired by loss or misfortune, may, for the purpose of recuperating itself, and of producing new conditions for the successful prosecution of its business, issue new stock, and put it upon the market, and sell it for the best price that can be obtained: and in such case no such trust in favor of a creditor arises against the purchaser who, in good faith, buys for less than par.

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Statement of the Case.

THIS was a bill in equity, filed by Sebastian Stutz, of Pittsburg, Pa., by certain other persons composing the firm of Ragon Brothers, of Evansville, Indiana, and by others composing the firm of Louis Stix & Co., of Cincinnati, Ohio, on behalf of themselves and such other creditors of the Clifton Coal Company as should come in and contribute to the expenses of the suit, against the Clifton Coal Company and certain of its stockholders, to compel an assessment upon certain shares of stock held by the individual defendants, and payment of the same as a trust fund for the satisfaction of the debts of the company. The bill averred in substance that the Clifton Coal Company was incorporated under the laws of the State of Kentucky, in July, 1883, with power to purchase, lease and operate coal mines in the State of Kentucky, a copy of the articles of incorporation being annexed to the bill; that by said articles the capital stock of such corporation was fixed at $120,000, divided into shares of $100 each, with power to increase the same to $200,000, by a majority vote of the stockholders; that all the stock was then taken and paid for by the subscribers in some manner agreed upon between them; that, pursuant to the authority contained in the articles of incorporation, the stockholders, all of them being present and voting, "at a meeting duly held for the purpose in May, 1886, unanimously resolved and ordered that the capital stock of said company be, and in fact it was, then increased to $200,000, in shares of $100 each, being an increase of 800 shares of stock of said company;" that of the 800 shares then created, the defendant Handley subscribed for 86¾ shares, two of the other defendants for 15 shares each, and two others for 75 shares each, certificates of which were issued by the company, and delivered to, and received by, said subscribers, as they were respectively entitled; but that neither one of them ever paid to the company any part of the said shares, and they each, respectively, owe the said company the full par value of the shares of the said capital stock subscribed for and issued to them.

The bill also averred that on December 30, 1886, it having been previously resolved to issue bonds to the amount of

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$50,000, and to secure the payment thereof by a mortgage upon its property, and said mortgage having been executed to trustees and recorded, a contract was executed and delivered to the company by certain others of the defendants, whose names were subscribed thereto, in the following terms: "We, the undersigned, subscribe for the amount set opposite our names, respectively, to bonds of the Clifton Coal Company, aggregating $50,000. It is agreed that $50,000 capital stock be distributed *pro rata* among the subscribers to the above bonds;" that several of the defendants subscribed to this contract, and agreed to take bonds in different amounts; that said subscribers paid the coal company for the bonds, and that with the money thus received, to the extent of $30,000, the company paid its debts to certain of its officers and managers, who had become liable by endorsement for the company, and that nothing was or ever had been paid for or upon any of the shares of capital stock thus subscribed for, and to be distributed among them; that is to say, $50,000 of said capital stock, equivalent to 500 shares thereof, was in fact subscribed for and distributed among certain of the defendants, to whom, in May, 1887, there were issued and received by them respectively certificates for shares.

The bill further averred that the plaintiffs were judgment creditors of the company, by judgments obtained in the courts of Kentucky; that their debts were created before all of the capital stock of said company was paid in; and that all of said $80,000 increase of the capital stock, and each and all of the amounts due to the company for any part of its capital stock, constituted a trust fund for their benefit, which they were entitled to have administered in a court of equity to the satisfaction of their said debts, the company being insolvent.

It further appeared from the testimony that the company was organized soon after its articles of incorporation were filed; that its chief office was at Mannington, Kentucky; and that it began business at once and made large outlays and expenditures for machinery, buildings, materials and labor. In the early part of the year 1886, the company was led to believe that its coal would coke, and, therefore, its products

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could be profitably extended from grate and steam purposes to iron-making coke. To embark in the manufacture of coke, however, money was needed, and a meeting of the stockholders was held March 31, 1886, at which a resolution was passed, reciting that $50,000 was needed with which to erect coke ovens, buildings, improvements, etc., to further develop the property; and it was unanimously resolved to issue $50,000 of bonds of the company, in sums of $1000 each, due thirty years from April 1, with 6 per cent interest, and secured by a trust mortgage upon the property of the company, and the president was authorized to dispose of such bonds as in his discretion seemed best. The mortgage was executed to the designated trustee and recorded. It was found, however, that the bonds could not be sold, and to meet the demands upon the company for money, it borrowed a large amount upon its notes, endorsed by its directors and stockholders, and to secure the lenders and endorsers, the $50,000 of bonds were deposited in two banks in Nashville, Tennessee, as additional collateral security for the loans. Finding that no one would purchase the bonds, and being advised that in order to effect their sale it would be better to add an equal amount of stock to the bonds, and propose to the purchasers of such bonds to give as a gratuity $1000 of stock with each $1000 bond, a meeting of the stockholders of the company was held at Nashville, May 31, 1886, at which all the stockholders were present in person or by proxy, although without any call or previous notice, and "it was unanimously resolved that the capital stock of the company be increased to $200,000, as authorized by the charter." This resolution was not then entered upon the records of the corporation, but was formulated in the shape of a pencil memorandum, and adopted unanimously, although no vote appeared to have been taken, and no formal record was made of the meeting until the summer of 1888. No notice of such change in the amount of its capital stock was recorded or published, as required by the laws of Kentucky. The subscribers to the bonds subsequently executed the agreement set forth in the bill, and bonds to the amount of $45,000 were delivered to the subscribers with equal amounts of certificates of "paid

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up" stock, the receipts reciting that it "was issued with bonds for same amount, as per agreement." The certificates on their face recited that the shares of stock were fully paid up "and were non-assessable," or language to that effect. Five thousand dollars of the bonds were left in one of the national banks at Nashville as collateral security for a loan to the company, no one having subscribed for them. The remaining $30,000 shares of increased stock, which were not needed to secure the subscribers to the bonds, appeared to have been distributed *pro rata* among the old stockholders. In the latter part of 1887, and in the early part of the following year, plaintiffs obtained judgments against the company, which were unsatisfied, and in September, 1887, by an order of the Circuit Court of Hopkins County, Kentucky, the entire property of the company was placed in the hands of a receiver, and its operations stopped.

On February 8, 1889, this bill was filed against the coal company and the holders of this increased stock, to compel payment therefor, and to recover the amounts of the judgments against the company. The court dismissed the bill as to three of the defendants not served with process, and as to the rest held them liable to all the creditors of the company whose debts originated after the alleged increase of stock, and fixed May, 1886, as the date of such increase. As to debts contracted prior to that date, they were excluded because, as between the company and the stockholders, the latter held such stock properly, and without liability to the company, and all creditors who dealt with the company prior to such increase, and not upon the faith of such stock, had no equity to demand more than the company itself could. Five of the defendants against whom decrees were rendered in excess of $5000 appealed to this court, and the Circuit Court suspended the execution of the decree as to those who could not appeal, until this court should determine the rights of the appellants.

The opinion of the Circuit Court is reported in 41 Fed. Rep. 531.

Mr. Edward H. East and *Mr. James Stuart Pilcher* for appellants.

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Mr. Walter Evans and *Mr. James R. MacFarlane* for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

1. Although the resolution of May 31, 1886, increasing the stock of the company from $120,000 to $200,000, was not formally entered at that time upon the books of the company, and nothing but a pencil memorandum was then made of the proceedings of the meeting, no objection can be taken to its validity by reason of such omission. The testimony shows clearly what took place at this meeting. It appears from the memorandum made by Mr. Allen, the acting secretary, to have been "unanimously resolved that the capital stock of the company be increased to $200,000 as authorized by the charter, the purposes for which said stock is issued being the betterment of the present plant, and the construction of a new plant for coking purposes." This resolution was subsequently, and in 1888, when the omission to record the same appears to have been first discovered, formally entered upon the minute book of the corporation. The failure to enter this resolution at the time it was adopted did not affect its validity, as most corporate acts can be proved as well by parol as by written entries. *Moss* v. *Averell*, 10 N. Y. 449.

2. Nor were the proceedings of such meeting any less binding upon those participating in it by reason of the fact that it was held without call or notice, and outside the boundaries of the State under the laws of which the company was incorporated. By an act of the legislature of Kentucky of March 3, 1876, General Statutes, page 769, "all elections for directors and other officers, by private corporations, etc., shall be held within the territorial limits of the State of Kentucky. . . . Any such elections held outside of Kentucky shall be void." Beyond the election of officers, however, there is no statutory restriction of corporate action to the limits of the State, and in the absence of such inhibition the proceedings of such meeting would, within the rule laid down by this court in *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, with regard to directors'

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meetings, be binding upon all those participating in it, as well as upon those acting upon the faith of its validity, or receiving stock authorized to be issued at such meeting. It is true there are cases holding that stockholders' meetings cannot be legally held outside of the home state of the corporation, but the question has generally arisen where a majority present at such meeting had attempted by their action to bind a dissenting minority, or had taken action prejudicial to the rights of third persons. *Ormsby* v. *Vermont Copper Mining Co.*, 56 N. Y. 623; *Hilles* v. *Parrish*, 14 N. J. Eq. (1 McCarter,) 380. Indeed, so far as we know, the authorities are uniform to the effect that the action taken at such meetings is binding upon those who participate in or take the benefit of them. *Heath* v. *Silverthorn Lead Mining Co.*, 39 Wisconsin, 146. In this case the meeting was attended by all the stockholders but two, who were represented by proxy, the vote increasing the stock was unanimous, and it does not lie in the mouth of those who participated in this act, or received the stock voted at this meeting, to question its validity.

3. It is further claimed that this issue of stock was invalid by reason of the fact that there was no amendment of the charter authorizing such increase ever recorded or published, as required by the law of Kentucky. The proceeding for the organization of incorporated companies is found in chapter 56 of the General Statutes of Kentucky, the fifth section of which requires a notice to be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business, specifying several particulars, among which is the amount of capital stock authorized, and the times when, and the conditions upon which, it is to be paid in. Section six is as follows: "The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made, and the copy filed in the office of the Secretary of State, when such filing is necessary, within three months from such filing in the clerk's office. No change in any of the foregoing particulars shall be valid, unless recorded and published as the original articles are required to

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be; nor shall any change be made at any time or in any manner which would be inconsistent with the provisions of this act." Reliance is placed upon the final clause of this section, for the position assumed by the defendants, that the increase in the capital stock never having been recorded or published, as required by this clause, was void, and the case of *Scovill* v. *Thayer*, 105 U. S. 143, is cited in support of this contention. That was also an action to recover unpaid assessments upon stock. The statutes of Kansas provided that any corporation might increase its capital stock to any amount, not exceeding double the amount of its authorized capital. The corporation in question had increased its capital stock, as it was authorized to do, by doubling it, and it subsequently increased it by doubling it again, thus quadrupling the original amount, the defendant in the case having attended by proxy the meeting at which such illegal increase was voted, and received a quantity of the stock thus issued. It was held that such increase was *ultra vires* and void, and that the defendant was not estopped from denying the validity of the over-issue, or his obligation to pay for it.

In the case under consideration, however, the articles of incorporation did provide that the capital stock should be $120,000, with power to increase to $200,000 by a majority vote of the stockholders, and there was no statutory inhibition, as in Kansas, against any such increase as it might be thought advisable to make. Here, then, was the power to increase the capital stock to the precise amount fixed by the stockholders, at their meeting at Nashville, and the defect was merely in the failure to record and publish such change, as required by section six of the statute in question.

It is insisted by the appellees, and the learned judge of the Circuit Court so held, that the failure to record and publish this increase of the capital stock, which was in fact, if not in name, an amendment to the original articles, which had fixed the capital stock at $120,000, was a mere irregularity and informality in the proceedings to effect the increase; such a one, as was said by this court, in *Chubb* v. *Upton*, 95 U. S. 665, 667, to constitute no defence to a subscriber to such increased

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stock. In that case it appeared only that objection was made to the proceedings by which the company increased its stock, on the ground of irregularity and informality in the papers filed in the public offices; and it was held that one who contracted with an acting corporation, by purchasing stock in the same, could not defend himself against a claim upon such contract, in a suit by the corporation, by urging the illegality of its organization. In *Veeder* v. *Mudgett*, 95 N. Y. 295, 310, which was also an action by directors against stockholders of a corporation to enforce the liability imposed upon them because of an alleged failure to pay in the full amount of the capital stock, it appeared that the meeting at which the increased stock was voted was not formally called, nor was a certificate of the increase of capital made and filed as prescribed by the state statute. The stock was, however, all issued to stockholders who voted for the increase. These holders subsequently received dividends thereon, voted at stockholders' meetings, and in all respects were treated and acted as stockholders. The court held the attempted increase illegal, but that the defendant stockholders, as against the creditors of the company, by accepting their proportions of the increased stock, by voting for its increase, by taking dividends upon it, and by holding it out to those dealing with the company as an actual component of its capital, were estopped from denying the validity of the increase. It was argued in that case, as it is in this, that an act absolutely and wholly void, because incapable of being performed, could not be made valid by estoppel. But this was held to be true only where there was an entire lack of power to do the act so brought in question, and the case of *Scovill* v. *Thayer* was cited. "But where," says the court, "as in the present case, the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected, and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase."

It is true that in neither of those cases was the court embar-

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rassed by a statute declaring that certain conditions must be observed or the increase would not be valid. But we think that the clause of section 6, upon which reliance is placed, must be read in connection with section 18 of the same act, which provides that "no persons, acting as a corporation under the provisions of this act, shall be permitted to set up or rely upon the want of legal organization as a defence to an action brought against them as a corporation; nor shall any person who may be sued on a contract made with such corporation, or sued for an injury done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his defence." It is true that this section seems to apply rather to a want of an original legal organization of the company; but we think it should be regarded as applying as well to amendments to such organization, and that no defence connected with the original organization, which a party contracting with the corporation would be disqualified to set up, can be made available in connection with an amendment to the original articles.

So far as the question of liability to the proposed assessments is concerned, these defendants, with respect to their relations to this corporation, are divisible into two distinct classes: First, those of the original stockholders who received the $30,000 increased stock as a gift; second, those who subscribed to the $50,000 bonds, and received an equal amount of stock, as a bonus or inducement to make the subscription.

4. With regard to the first class, namely, the original stockholders, who voted for this increase of 800 shares, and then distributed among themselves 300 of those shares, without the shadow of right or consideration, it is difficult to see why they should not be called upon to respond for their value. The only claim made upon their behalf is that they never agreed to contribute or pay for the same; that the stock was expressly declared to be "fully paid" and "free from all claims or demands upon the part of the company;" that there was no evidence that the creditors of the company knew of, or relied upon, this increase, in their dealings with the company; and that they had a right to return and surrender the same,

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which they offered to do. There is no reason to suppose that these stockholders did not act in good faith, and in the belief that they were entitled to this stock. The fact that they did not subscribe for it or agree to take it until the receipt of the certificates, is immaterial, as the acceptance of the certificates is sufficient evidence of an agreement to pay their par value. *Sanger* v. *Upton*, 91 U. S. 56, 64; *Chubb* v. *Upton*, 95 U. S. 665; *Brigham* v. *Mead*, 10 Allen, 245.

Ever since the case of *Sawyer* v. *Hoag*, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. *Upton* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; *Webster* v. *Upton*, 91 U. S. 65; *Chubb* v. *Upton*, 95 U. S. 665; *Pullman* v. *Upton*, 96 U. S. 328; *County of Morgan* v. *Allen*, 103 U. S. 498; *Hawkins* v. *Glenn*, 131 U. S. 319; *Graham* v. *Railroad Co.*, 102 U. S. 148, 161; *Richardson* v. *Green*, 134 U. S. 30.

It is simply in affirmance of this general principle that section 14, chapter 56, of the General Statutes of Kentucky declares that nothing in the act conferring corporate franchises, or permitting the organization of corporations "shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid instalments on stock owned by them." If the corporation has no right as against creditors, to sell or dispose of this stock with an agreement that no further assessment shall be made upon it, much less has it the right to give it away, or distribute it among shareholders, without receiving a fair equivalent therefor, and thereby induce the public to deal with it upon the credit of such shares, as representing the assets of the corporation. *Union Mut.*

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Life Ins. Co. v. *Frear Stone Mfg. Co.*, 97 Illinois, 537. The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent to which it fails to represent such value it is either a deception and fraud upon the public, or an evidence that the original value of the corporate property has become depreciated. The market value of such shares rises with an increase in the value of the corporate assets, and falls in case of loss or misfortune, whereby the value of such assets is impaired. And the increase of value of such stock is taken to represent either an appreciation in value of the company's property beyond the par value of the original shares, or so much money paid to the corporation as is represented by such shares. If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be "watered," except the caprice of the stockholders. While an agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, it has been uniformly held by this court not to be binding upon its creditors.

5. Somewhat different considerations apply to those who subscribed for the bonds of the company, with the understanding that they were to receive an amount of stock equal to the bonds as an additional inducement to their subscription. The facts connected with this transaction are substantially as follows: Some three years after the company was organized it became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success, owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig iron. To embark in this, however, money was needed, and as

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the stock of the company was not worth more than 50 cents on the dollar, it was evident this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of $50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and, acting upon the suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased 800 shares, 500 of which should be turned over to the subscribers to the bonds, as a bonus or an additional consideration. The evidence is uncontradicted that the bonds could not have been negotiated without the stock; that they were both sold as a whole; that the transaction was in good faith, and, considering the risk that was taken by the subscribers, the price paid for the stock and bonds was fair and reasonable. The directors appear to have done all in their power to obtain the best possible terms, and there is no imputation of unfair dealing on the part of any one connected with the transaction. At that time the mines and property of the company were in good condition, and the prospects of success were fair.

The case then resolves itself into the question whether an active corporation, or as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point. In the *Upton Cases*, arising out of the failure of the Great Western Insurance Company; in *Hatch* v. *Dana*, 101 U. S. 205, and in *Hawkins* v. *Glenn*, 131 U. S. 319, the defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not as in this case to purchase property or raise money to add to the plant, and facilitate the operations of the company, but simply to increase its original stock

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in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In *County of Morgan* v. *Allen*, 103 U. S. 498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is *bona fide*, and not a mere cover for "watering" the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par

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value, is subject to exceptions where the transaction is not a mere cover for an illegal increase.

Thus in *New Albany* v. *Burke*, 11 Wall. 96, a city subscribed to the stock of a railroad, and issued bonds for a part of the subscription, agreeing to issue them for the rest of it, when the road should be built to a certain point. The road relied mainly upon these bonds to raise the necessary money. The validity of the bonds being denied by taxpayers, who had filed bills to enjoin the raising of a tax to pay the interest, their value in the market was largely impaired, and it was found they could not be sold without a sacrifice. Under these circumstances the company applied to the city to pay a certain sum which had been borrowed by the road upon the pledge of the bonds already issued, with sundry other moneys, and in consideration thereof the city obtained from the company a large number of bonds which had not been negotiated, and a cancellation of the subscription. In a suit brought by a judgment creditor to enforce the original subscription, it was held that the compromise was legal, and the payment of such subscription would not be enforced, although it subsequently turned out that the bonds were worth more than they could have been sold for. Said Mr. Justice Strong, speaking for the court: "Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction . . . was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued and others of which it was under obligation to issue, at the call of the vendor. . . . Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. . . . We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong

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creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market."

So in *Coit* v. *Gold Amalgamating Company*, 119 U. S. 343, it was held that where the charter of a corporation authorizes the capital stock to be paid for in property, and the shareholders honestly and in good faith pay for their subscriptions in property instead of money, third parties have no ground of complaint, although a gross and obvious over-valuation of such property would be strong evidence of fraud in an action by a creditor to enforce personal liability. The court held that where full-paid stock was issued for property received there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. In delivering the judgment of the court in that case at the circuit, 14 Fed. Rep. 12, Mr. Justice Bradley observed: "That trust (in favor of creditors) does not arise absolutely in every case where capital stock has been issued, and where it has been settled for by arrangement with the company. It is not as if the stockholders had given their promissory notes for the amount, these notes being in the treasury of the company; but there are often equities to which the stockholders are entitled — on which they are to stand." As one of them, he mentioned the case of stock dividends fairly made in consideration of profits earned and of accumulations of the property of the company, and observed: "It is not true that it is in the power of a creditor in every case, and in all cases, as a mere matter of right, to institute an inquiry as to the valuation of the amount of the consideration given for the stock, and disturb fair arrangements for its payment in other ways than by cash. If the stock has been fairly created and paid for, there is an end of trusts in favor of anybody; and this does not affect the general proposition that unpaid subscriptions of stock are a trust fund to be administered for the benefit of creditors after a corporation becomes insolvent."

A case nearer in point is that of *Clark* v. *Bever*, *ante*, 96, decided at the present term of this court. In this case, a rail-

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road company, of which defendant's intestate was president and stockholder, had a settlement with a construction company, of which defendant's intestate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it thirty-five hundred shares of its stock at 20 cents on the dollar, and the same were accepted in full satisfaction of the debt. The stock was not worth anything in the market, and was issued directly to the defendant's intestate. No other payment than the 20 per cent was ever made on account of this stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim, upon the theory that he was liable for the actual par value of such stock, whatever may have been its market value at the time it was received. It was held he could not recover. "Of course, under this view," says Mr. Justice Harlan, in delivering the opinion of the court, "every one having claims against the railway company, — even laborers and employés, — who could get nothing except stock in payment of their demands, became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although, at the time it was sought to make them liable, the corporation had ceased to exist, or its stock had remained, as it was when taken, absolutely worthless. . . . To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value — there being no statute forbidding such a transaction, — without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property."

So in *Fogg* v. *Blair*, *ante*, 118, also decided at the present term, it was held to be competent for a railroad, exercising good faith, to use its bonds or stock in payment for the construction of its road, although it could not, as against creditors

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or stockholders, issue its stock as fully paid without getting some fair or reasonable equivalent for it. It was there said: "What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them." It appeared in that case that full and adequate compensation for the work done had been paid by the company in its mortgage bonds, and, as the bill contained no allegation whatever as to the real or market value of such stock, it was held that the contractors receiving this stock were not liable to creditors for its par value. It was added: "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit on the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court — assuming such facts to be true — to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized." It would seem to follow from this that if the stock had been of some value, that value, however much less than par, would have been the limit of the holder's liability.

In *Morrow* v. *Nashville Iron and Steel Co.*, 87 Tennessee, 262, 275, 276, the Supreme Court of Tennessee held, that a contract with a subscriber to stock of a corporation, that for every share subscribed he should receive bonds to an equal amount, secured by mortgage on the company's plant, is void as against creditors, and also between the subscriber and the corporation. But the court drew a distinction between such a case and sales of or subscription to the stock of an organized and going corporation. It said: "The necessities of the business of an organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be

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liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such cases, the question of fraud aside, a purchaser would only be held for his contract price." This case from Tennessee puts as an illustration the exact case with which we are now dealing.

The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained. *Stein* v. *Howard*, 65 California, 616. As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company. Our conclusion upon this branch of the case disposes of it as to those who were held liable by virtue of their subscription to the bonds.

6. We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. *First National Bank of Deadwood* v. *Gustin Minerva Consolidated*

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Mining Company, 44 N. W. Rep. 198; 2 Morawetz on Corporations, §§ 832–3; *Coit* v. *N. C. Gold Amalgamating Co.*, 14 Fed. Rep. 12. We also agree with him, that creditors who became such after the increase was voted in May, 1886, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been contracted. The circuit judge found in this connection that the "complainants had no knowledge or notice of the subscription paper of December 30, 1886, under which $45,000 of the new stock was distributed to those who subscribed for bonds, nor of the distribution among the old stockholders of $30,000 of said increased stock, nor does it affirmatively appear that they or either of them dealt with and trusted the company upon the faith of that increased stock; but the fact that the capital stock had been increased to $200,000 was made public and was generally known." The real question in this connection is — when may it be presumed creditors trusted the corporation upon the faith of the increased stock? Obviously, when such increase was ordered. That is a fact to which publicity would naturally be given; the creditors could not be expected to know when and by whom such stock would be taken. It is true they assume the risk of the stock not being taken at all, but the moment shares are taken, they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment not only of future, but of existing creditors. It is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock, would, in a case like this, where the creditors and stockholders are both numerous, lead to inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties.

7. With regard to the special defence set up by Neely, that he never consented to nor received certificates for increased stock, we agree with the circuit judge that it is not sustained. He did not live in Nashville, but had given a proxy to one

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Sandford to represent him at stockholders' meetings; he knew of the arrangement to issue an amount of the stock equal to the bonds, and to distribute $30,000 of the increased stock, ordered by the resolution of May, 1886; and on April 5, 1887, he gave a power of attorney to Sandford, authorizing the latter, for him, and in his name and stead, to "receipt to the Clifton Coal Company for stock in my name, and transfer, bargain and sell the same as if I were there present." Under this power of attorney, Sandford surrendered Neely's certificate for 300 shares, and receipted for 375 shares, the certificates for which were delivered to him as agent of Neely, and which Sandford subsequently voted at stockholders' meetings, under the general proxy from Neely to represent his stock. Knowing of the contemplated action in issuing the new stock, and having authorized Sandford to represent him in all matters connected therewith, we think it too late for him to repudiate Sandford's act in receiving the additional 75 shares, which were distributed to him as the owner of 300 original shares. Indeed, the circuit judge finds it to be established by the proof that all of the old stockholders knew of and acquiesced in the disposition of the new stock as made; and that such increased stock was represented and voted at subsequent meetings of stockholders, and was recognized and held out to the public as part of the capital stock of the company. Under the case of *Sawyer* v. *Hoag*, 17 Wall. 610, Neely was clearly not entitled to set-off against the claim of the creditors his own claim against the corporation. Cook on Stock and Stockholders, secs. 193 and 194.

There are several minor points made in the briefs of counsel with regard to the claims of certain creditors, which we do not find it necessary to discuss at length. We think there was no error in the rulings of the court in these particulars.

It results that the decree of the court below must be

Reserved, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Lamar, dissenting.

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I dissent from the conclusion of the court in respect of the stock received by the subscribers to the bonds. That stock was not paid for in money or money's worth, or issued in payment of debts due from the company, or purchased at sale upon the market. It was a mere bonus, thrown in with the bonds as furnishing the inducement to the bond subscription, of larger control over the corporation, and of possible gain without expenditure. Becoming secured creditors through the bonds, the subscribers increased their power through the stock. In my view, there was no actual payment for the stock, and to treat it as paid up, is to sanction an arrangement to relieve those who would reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure, of the enterprise.

When the capital stock of a corporation has become impaired, or the business in which it has engaged has proven so unremunerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk.

My brother LAMAR concurs with me in this dissent.

TALBOTT *v.* SILVER BOW COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 221. Submitted March 12, 1891. — Decided March 30, 1891.

The territories possess the same power of taxing national banks which States enjoy.

Section 1003 of chapter 53 of the fifth division of the Revised Statutes of Montana Territory, as amended by the Act of February 22, 1881, Laws of 1881, p. 67, is not in conflict with Rev. Stat. § 5219.

Under the general Territorial system, as expressed in the various organic acts, the power of taxation is absolute, save as restricted by the Constitution or congressional enactments.

THE case is stated in the opinion.

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Mr. James W. Forbis for appellant.

Mr. J. H. McGowan for appellee.

Mr. Justice Brewer delivered the opinion of the court.

This case was submitted to the District Court of the Second Judicial District of Montana Territory, on the following agreed statement of facts:

"1. That the First National Bank of Butte is now and was during all of the year 1885 and before that time a corporation duly created under and by virtue of the laws of the United States relating to national banks, and located and carrying on a general banking business in Butte City, in said county of Silver Bow and Territory of Montana, and that the capital stock of said bank is one hundred thousand dollars, divided into one thousand shares of one hundred dollars each.

"2. That during all of said year 1885 the said defendant, Andrew J. Davis, was the owner and holder of nine hundred and forty shares of the capital stock of said bank, and that said shares were during all of said year and are now of the true value in money at private sale and of the market value (which is the same) of one hundred and twenty-five dollars each.

"3. That for and in the said year 1885 there was duly levied and assessed, according to the laws of Montana Territory, in said Silver Bow County, for Territorial, county and other purposes, upon all property in said county subject to taxation, an ad valorem tax amounting in all to thirteen and three-tenths mills on each dollar of assessed valuation.

"4. That said nine hundred and forty shares of stock of the said the First National Bank of Butte were assessed for taxation, in the manner prescribed by the laws of said Montana Territory for said year 1885, to said defendant, Andrew J. Davis, (who then owned and held said shares in said county of Silver Bow,) at their estimated true value in money at private sale and at their market value (which is the same); that said defendant has not, nor has said bank, or any one for him or it, ever paid said tax on said shares so assessed as aforesaid or any part of said tax.

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"5. That in the general assessment in said Silver Bow County for said year 1885 shares of stock in corporations generally were assessed in accordance with the provisions of section 1003 of chapter LIII of the fifth division of the Revised Statutes of Montana Territory, as amended by the act of the legislature of February 22, 1881, on page 67 of the laws of 1881, and where the entire capital stock of any incorporated company was invested in assessable property in said Territory, such stock or the shares thereof were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent from the United States were assessed at the government price of five dollars per acre without regard to their market value; that there are a large number of mining corporations in Montana Territory whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims."

And upon these facts the following questions were presented:

"1. Under the laws of the United States and of the Territory of Montana are shares of stock in national banks located in said Territory subject to taxation at all?

"2. Upon the facts in this case was the said assessment and taxation of said shares of stock to defendant in violation of or in conflict with the restriction contained in section 5219 of the Revised Statutes of the United States relating to the taxation of shares of national banks, and providing that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of the Territory?"

In the District Court these questions were determined in favor of the plaintiff, the county commissioners, and this decision was affirmed by the Supreme Court of the Territory. The case is now here on appeal.

That shares of stock in a national bank are not subject to taxation without the consent of Congress is conceded. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Weston* v. *Charleston*, 2 Pet. 449; *Peo-*

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ple v. *Weaver*, 100 U. S. 539. And the contention is, that Congress has given consent to taxation thereof only by States and has not extended like privileges to a Territory. Section 5219 of the Revised Statutes contains the declaration of Congress in respect to this matter. It reads:

"SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as any other real property is taxed."

In this section no express reference is made to Territories; States only are mentioned. Tested by the letter, the argument is short and clear. Congressional permission is essential; no permission is given to the Territories; therefore, Territorial taxation is unauthorized and void. Whatever may be the voice of the letter, the argument fails because the minor premise cannot be sustained. Can it be that Congress meant to give power to the States to tax, and to withhold that power from the Territories? Some plausible reason should be suggested before the intention is imputed to Congress of granting to an independent jurisdiction, such as a State, the power to tax one of its own instrumentalities, and at the same time withholding a like power from a political organization like that of a Territory wholly dependent upon Congress, and subject to its absolute supervision and control. Such is not the ordinary lesson of experience. If the matter in respect to

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which such an intent was imputed were wholly of interest to the States, or designed purely for the exercise of powers within the States, then properly all general expressions in the statute might be limited to States, and the intent of Congress be supported and established by the character of the subject-matter of the legislation. The converse of this is true. The national banking system was national in its design, coextensive in its operation with the territorial limits of the United States, and intended to be the banking system for the whole country, Territories as well as States. Section 5134 of the Revised Statutes, which provides for the incorporation of a national bank, requires in its second clause that its organization certificate shall state "the place where its operations of discount and deposit are to be carried on, designating the State, Territory or District, and the particular county and city, town or village." Section 5146 requires that "at least three-fourths of the directors must have resided in the State, Territory or District in which the association is located, for at least one year immediately preceding their election." Section 5178 provides that "one hundred and fifty millions of dollars of the entire amount of circulating notes authorized to be issued shall be apportioned to associations in the States, in the Territories and in the District of Columbia, according to representative population." Section 5180 provides for a statement showing the amount of circulation in each State and Territory, a withdrawal from those States having an excess of circulation, and that "the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same." Section 5197 authorizes the association to charge and receive "interest at the rate allowed by the laws of the State, Territory or District where the bank is located." Section 5239 provides for a forfeiture of the franchises of the banking association upon an adjudication of a violation of the act; "such violation shall, however, be determined and adjudged by a proper Circuit, District or Territorial court of the United States, in a suit brought for that purpose," etc. Section 5240 prescribes the compensation to be paid to examiners of banks "in the States of Oregon, California and Nevada or in the Territories."

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These various provisions, scattered through the entire body of the statute respecting national banks, emphasize that which the character of the system implies — an intent to create a national banking system coextensive with the territorial limits of the United States, and with uniform operation within those limits, to establish everywhere throughout the United States banks with the security which a national examination gives, and furnish a currency of uniform value, the same in Arizona as in New York, in Territory as in State. Given a system of such national character, and such uniform and universal operation through the entire territorial limits of the country, before any particular section of the statute creating it shall be tortured into creating a discrimination and difference in privileges and burdens by reason of locality, its language must imperatively demand such construction. Were it claimed that it permitted local taxation east of the Alleghanies and forbade it west, even if the power of Congress in respect to such a discrimination were conceded, the section invoked to justify such a contention would have to be clear and imperative in its language. Differences arising from mere adaptation to local statutes is one thing, while discrimination by reason of locality, or political organization, is another, and essentially diverse. It does not conflict with the national character of the system that the banks of the various States and Territories may charge and receive a rate of interest allowed by the local statutes; that is merely the adaptation of the system to the laws and customs of the various States; but it would militate much against its national character if banks organized under it were subjected to local taxation in one part of the Union, and exempted from it elsewhere. No such intent ought lightly to be imputed to Congress.

Further it is a general rule in the construction of statutes that when in the earlier and declaratory sections the scope and extent of the power and privileges granted are once stated, the character of the grant as thus disclosed controls and interprets all subsequent sections; and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privi-

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leges; but these subsequent sections will be understood, (unless there be words of restriction and limitation therein,) as coextensive with and applicable to the scope, and the full scope, and extent of the powers theretofore granted. So when, in the sections providing for the incorporation of national banks, the thought of their existence in States and Territories alike is affirmed, the character and extent of the banking system are disclosed; and subsequent sections must be taken to be in support, rather than in derogation, of the national feature of this national system.

Still further, while the word State is often used in contradistinction to Territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word State has been recognized in the decisions of this court. Thus, in the early case of *Hepburn* v. *Ellzey*, 2 Cranch, 445, 452, Chief Justice Marshall observed: "On the part of the plaintiffs it has been urged that [the District of] Columbia is a distinct political society; and is, therefore, 'a State,' according to the definitions of writers on general law. This is true." In *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 9, Mr. Justice Bradley, speaking for the court, declared that "it is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State." And in the case of *Geofroy* v. *Riggs*, 133 U. S. 258, 268, a similar construction was given to the use of the word "State," and in a clause which seemed on the face to carry a narrower meaning than the language used in section 5219, *supra*. The clause was found in a treaty between France and the United States, and that clause was as follows: "In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States." On the face of

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the language, the word "State" would seem to refer, not to political communities in general, but to those particular communities which form the States of the Union; yet it was held to include the District of Columbia, this court, by Mr. Justice Field, observing: "This article is not happily drawn. It leaves in doubt what is meant by 'States of the Union.' Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States."

But the argument does not rest here. Upon what principle is the power of a State to tax a national bank, without the consent of Congress, denied? The answer to this question was fully given by Chief Justice Marshall in the cases of *McCulloch* v. *Maryland* and *Weston* v. *Charleston*, *supra*. Briefly stated, the argument was this: Two distinct sovereignties, the State and the United States, exercise jurisdiction within the same territorial limits. Each has the power of taxation. This power is in its nature absolute and unlimited. Power to tax is power to destroy. Given to the State the power to tax any of the instrumentalities which the United States creates for the exercise of its jurisdiction, and the former may impede, if not wholly stop, the latter in the discharge of its duties as sovereign. Hence, by necessary implication, the absolute exemption from state taxation of any of the instrumentalities — and among them are national banks, which the United States creates for the exercise of its powers and the discharge of its duties. But the whole argument fails

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when applied to a Territory. It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization. Who would contend, in the absence of express legislative provision therefor, that a bank created by or under the laws of a State, and located and doing business in a city of that State, could claim exemption from municipal taxation upon its property? A bank is an institution organized for private business, and with a view to individual profit, although it may serve a public purpose and such public purpose justify its creation; and no such private corporation has any implied exemption from local taxation by a municipal or political organization in which it is situated. The only ground on which exemption from such taxation can be based, in the absence of express legislative provision, is that the tax proceeds from a distinct and independent sovereignty. As the reason for the rule of exemption of a national bank from state taxation fails in respect to a bank located in a Territory, the rule also fails.

From these several considerations we conclude that there was no error in this ruling of the Supreme Court of the Territory of Montana, and that the same power of taxation in respect to national banks exists in the Territories that does in the States. We pass, therefore, to the second question presented, and that is whether the rule of assessment prescribed by the statute and adopted in this case was in violation of the restrictions contained in said section 5219.

The Montana statute, chapter 53, section 1003, supposed to conflict with the Federal statute, is as follows:

"SECTION 1003. All other property, real or personal, within the Territory, is subject to taxation in the manner herein directed, and this is intended to embrace improvements on lands and lots in towns, including land bought from the United States and from this Territory, whether bought on credit or otherwise, being franchises which, for the purpose of this

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chapter, are to be considered real property; ditches and flumes, horses, oxen and other cattle, except calves under eight months old, which shall be exempt from taxation; mules and asses, sheep, swine and goats; money in coin or gold dust, whether in possession or on deposit, and including bank bills; property or labor due from solvent debtors on contract or on judgment, whether in this Territory or not; mortgages and other like securities; stocks or shares in any bank or company, incorporated or otherwise, and whether incorporated by this or any other Territory or not, except that where the entire capital stock of any incorporated company shall be invested in assessable property in the Territory of Montana, such stock shall not be taxed; public stock or lands; household furniture not otherwise exempt, including gold and silver plate, musical instruments, watches and jewelry; pleasure carriages, stages, hacks and other vehicles for transporting passengers; wagons, carts, drays, sleds and other descriptions of vehicles or carriages; boats and vessels of every description, whenever registered or licensed, and whether navigating the waters of this Territory or not, if owned either in whole or in part by persons who are inhabitants of this Territory; annuities, but not including pensions from the United States or any of the States."

Under this section two propositions are presented. It is agreed that there are a large number of mining corporations in Montana whose entire capital stock is invested in assessable property, and that part of said property consists in mining claims. But this concession does not disturb the limitation of section 5219. The restriction therein imposed is equality of assessment with other moneyed capital; not with other property generally, but with that property which passes under the description of moneyed capital. The significance of this expression has been defined by this court in the case of *Mercantile Bank* v. *New York*, 121 U. S. 138, cited in *Palmer* v. *McMahon*, 133 U. S. 660, 667, as follows: "The term 'moneyed capital,' as used in Rev. Stat. § 5219, respecting State taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when

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the object of their business is the making of profit by the use of their moneyed capital as money, — as in banking, as that business is defined in the opinion of the court."

Obviously by this section, as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose capital in money is used with a view of compensation for the use of the money. And that is the only restriction which, under the agreed statement of facts, demands any consideration. The tax upon a corporation whose capital is invested in manufacturing or transportation cannot, under this section, be placed in comparison with the tax upon an institution whose business is profit on money as money. So, whatever may be the rule in Montana in respect to the taxation of mines and mining claims, or of corporations whose investments are wholly or partially in that direction, it does not challenge or disturb the rule of taxation of money as money, or of purely moneyed corporations, upon that basis. Under the general territorial system, as expressed in the various organic acts, the power of taxation is absolute, save as restricted by the Constitution or congressional enactments. The intention of Congress in the national banking system is, as we have noticed, in favor of local taxation, including therein territorial taxation of national banks upon the same basis as is imposed by the locality on other purely moneyed corporations and capital. That intention is not disturbed by the provisions of the Montana statute, and hence the rule of taxation in this respect cannot be ignored.

No other questions being presented, we see no error in the ruling of the Supreme Court of the Territory of Montana, and its decision is, therefore,

Affirmed.

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In re DUNCAN, Petitioner.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 1174. Argued December 17, 1890. — Decided March 30, 1891.

When the trial court of a State has jurisdiction and power, under state laws, to determine the law applicable to the case of an indictment and trial for murder, and the prisoner, when convicted, has an appeal to an appellate court of the State, of which he avails himself, the Circuit Court of the United States for the District, if applied to for a writ of *habeas corpus*, pending the appeal, upon the ground that the proceedings are in violation of provisions of the Constitution of the United States, may properly decline to interfere.

A statute duly certified is presumed to have been duly passed until the contrary appears.

When, in the trial of a cause, an objection is taken that the legislature failed to comply with the provisions of the Constitution in the enactment of a statute, it should be so presented that the adverse party may have opportunity to controvert the allegations, and to prove by the record due conformity with the constitutional requirements.

Whether a state statute has or has not binding force, by reason of compliance or non-compliance with the provisions of the constitution of the State, is a question for the state courts to determine.

THE case, as stated by the court, was as follows:

Dick Duncan was indicted by the grand jury of Maverick County, Texas, for the crime of murder, and having been arraigned, was tried in the District Court of that county and State, found guilty, and his punishment assessed at death, and the court entered judgment accordingly, from which he appealed to the Court of Appeals. He was thereupon committed to the jail of Bexar County upon the ground that there was no safe jail in Maverick County, McCall, the appellee here, being sheriff of Bexar County at the time.

While the case was pending on appeal and on the 10th of April, 1890, Duncan filed in the Circuit Court of the United States for the Western District of Texas his petition for a writ of *habeas corpus*, to be discharged from custody, on the ground that he was deprived of his liberty and about to be

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deprived of his life in violation of the Constitution of the United States.

The petition set forth the finding of four indictments for murder against petitioner, his arrest, trial, conviction and sentence, and copies of the record were attached.

It was alleged that petitioner was deprived of his liberty without due process of law, and denied the equal protection of the laws, because the "Penal Code and Code of Criminal Procedure" of the State of Texas, now and since July 24, 1879, recognized as law, under which his alleged trial was conducted, were not enacted by the legislature of the State of Texas, and that the definitions and rules in the supposed codes were materially different from the definitions and rules of procedure prevailing before their alleged adoption.

The petition then averred that the codes failed of enactment on these grounds in substance: That the bill which contained them was not referred to a committee and reported on in the house, and was not read on three several days in each house, as required by the state constitution; and although the legislature dispensed with the reading of the printed matter *in extenso*, and provided for a consideration on three several days, the bill was not so considered; that the two houses of the legislature never agreed to or came to a common legislative intent on the passage of the bill; that neither house of the legislature kept a journal of its proceedings as required; that an abortive attempt was made to dispense with enrolment, and there was no enrolment of the bill, or any substitute therefor; that there is no record in existence by which the accuracy of said statutes can be verified; that the legislature attempted to delegate legislative power to one Lyle, who proceeded to embody the alleged codes into a printed book, the volume known as the "Revised Statutes of Texas;" that the said volume is not a copy of or identical with the bill said to have been passed embodying them, but is widely variant therefrom, and from the original bill on file in the office of the Secretary of State; that the alleged law set out in the Revised Statutes was never considered or passed by the legislature of the State, nor consid-

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ered by the governor, and did not become a law; that the printing, binding, distribution and codification of the volume known as the Revised Statutes was never duly or legally authorized; and that the entire system of penal and civil laws is involved.

It was further alleged that the Court of Appeals of Texas was organized on the 6th of May, 1876, and that the judges selected to sit upon the bench of that court were elected on the third Tuesday in February, prior to the organization of the court; that the present presiding judge of the court was at that time elected and has since continuously succeeded himself; that the court is interested in the determination of the questions involved, because the statutes supposed to have been adopted attempted to make new and important provisions for the exercise of jurisdiction and judicial power by the court, and the civil statutes, which fixed the salaries of judges, determined the jurisdiction of certain judicial districts, and regulated the method of election of judges in the State, were attempted to be enacted at the same time and mainly in the same manner as above set forth; that a decision by any court of Texas upon the questions presented would tend to disturb the alleged and recognized legal system and code of laws of said State, and cloud the title to office of the judges of the State, and subject the court to severe criticism; and that petitioner has cause to fear that the courts of Texas would be unduly influenced to his prejudice.

The differences between the prior statutes and codes and those of 1879, which petitioner claimed operated to abridge his rights, privileges and immunities, as a citizen of the United States, and to deprive him of due process of law, seem, as he sets them up, to be that by the prior law the punishment of murder in the first degree was death, and the jury could not assess the punishment, so that imprisonment could not be inflicted if the crime were of that degree, whereas this could be done under the later law; that by the prior law grand juries were composed of not less than sixteen persons, while by the later, twelve was the number, though this was as prescribed by sec. 13, art. V of the Constitution; that chal-

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lenges to the array were allowed under the prior law for corruption in the summoning officer, and the wilful summoning of jurors with the view of securing conviction, whereas, under the later law, where the jurors called upon the trial had been selected by jury commissioners, in accordance with a law to that effect enacted in 1876, the challenge to the array was not allowed, but it was not averred that petitioner attempted to challenge the array; that under the prior law the indictment must charge the offence to have been "felonious" or done "feloniously," whereas, under the Codes of 1879, these words might be omitted as they were in this instance; and that under the prior law sheriffs were prohibited from summoning any person as a juror found within the court-house or yard, if jurors could be found elsewhere, but that some of the jurors who tried him were so summoned, although other jurors could have been found in the county.

The sheriff of Bexar County filed exceptions to the jurisdiction of the Circuit Court, and assigned, among other reasons, that the petition showed upon its face that the matters in controversy did not arise under the Constitution, laws or treaties of the United States, nor did the adjudication or determination of the same involve a construction thereof; but that the matters arose solely under the constitution and laws of the State of Texas, and their determination involved exclusively the construction of the State constitution and laws; that it did not appear from the petition that petitioner was restrained of his liberty and illegally held in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court thereof, or that he was in custody in violation of the Constitution or of a law or treaty of the United States; and that the Circuit Court had no power or jurisdiction to release petitioner from custody, inasmuch as he was held by a duly authorized and qualified officer of the State, under and by virtue of a judgment of a court of the State, in and by which he had been tried, convicted and adjudged guilty of a crime against the laws of the State, as appeared from the facts set forth in the petition. And the respondent further excepted, upon the ground that the petition

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was wholly inadequate and insufficient to authorize the relief sought, because it appeared from its allegations that the petitioner was arrested upon an indictment, charging him with the commission of the crime of murder, in violation of the laws of the State; that he was arraigned and duly tried and convicted of the crime as charged, and was by the court, in accordance with the verdict, sentenced, and was now held to await the execution of that sentence, unless reversed by the Court of Appeals of Texas, wherein the case is now pending on appeal from the court below; and that even if the validity of the present Penal Code and Code of Criminal Procedure of Texas were legitimately assailed, yet the petition was wholly insufficient, because there was no allegation that the provisions of the old code, which in such an event would have remained in force, were in the least dissimilar from the present, or that he would have been tried in a different way, or that he would have or might have received a different or lesser punishment.

May 14, 1890, the Circuit Court, on hearing the application, dismissed the petition and denied the writ. From that judgment petitioner appealed to this court.

Mr. T. J. McMinn and *Mr. A. H. Garland* for appellant. *Mr. H. J. May* was with them on the brief.

Mr. J. S. Hogg, Attorney General of the State of Texas, and *Mr. Richard H. Harrison*, Assistant Attorney General, for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court.

By section 1, Article V, of the constitution of Texas, the judicial power of the State was vested "in one Supreme Court, in a Court of Appeals, in District Courts, in county courts, in commissioners' courts, in courts of justices of the peace and in such other courts as may be established by law."

By section 3, the jurisdiction of the Supreme Court was confined to civil cases; by section 6 it was provided that "the Court of Appeals shall have appellate jurisdiction, coexten-

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sive with the limits of the State in all criminal cases, of whatever grade;" and by section 8, that "the District Courts shall have original jurisdiction in criminal cases of the grade of felony."

The District Court of Maverick County was created and organized by an act of the legislature of Texas, approved March 25, 1887. Laws of Texas, 1887, p. 46. It had jurisdiction to try the offence of which petitioner was accused, and acquired jurisdiction over his person and the offence charged against him, through the indictment and his arraignment thereon. He was charged with the commission of the crime of murder, which he did not deny was a crime against the laws of Texas, and that the penalty therefor was death. What he complained of in his application to the Circuit Court, was, that in the matter of indictment and trial, he had been subjected to the provisions of statutes which had not been enacted in accordance with the state constitution. The District Court had jurisdiction and the power to determine the law applicable to the case, and if it committed error in its action, the remedy of petitioner was that of which he availed himself, namely, an appeal to the Court of Appeals of the State. Under these circumstances the Circuit Court properly declined to interfere. *Ex parte Royall*, 117 U. S. 241, 245, 255; *Ex parte Fonda*, 117 U. S. 516. Nor does the contention of counsel in respect of the Court of Appeals justify any other conclusion.

Under sections 5 and 6 of Article V of the state constitution, the Court of Appeals was created as a court of last resort in criminal matters, its powers and jurisdiction defined, and the salary, tenure of office and qualifications of its judges prescribed. The determination of the validity or invalidity of the Civil or Penal Codes of 1879 would in no respect affect that court in these particulars, if the extraordinary claim of counsel in this regard were entitled to any consideration whatever in this proceeding.

Unquestionably it is a fundamental principle that no man shall be judge in his own case, and the constitution of Texas forbids any judge to sit in any case wherein he may be inter-

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ested, or where either of the parties may be connected with him by affinity or consanguinity within such degree as may be prescribed by law, or where he shall have been counsel in the case; and specific provision is made for commissioning persons to hear and determine any case or cases in place of members of the Supreme Court or Appellate Court, who may be therein thus disqualified. Const. Art. V, sec. 11. But no such question arises, or could arise, upon this record.

The constitution of the State of Texas was submitted by the convention which framed it to a vote of the people, on the third Tuesday of February, 1876, for their ratification or rejection, by an ordinance passed for that purpose; and it was provided that, if ratified, it should become the organic and fundamental law of the State on the third Tuesday of April following; and also that, at the same time that the vote was taken upon the constitution, there should be a general election held throughout the State for all state, district, county, and precinct officers created and made elective by the instrument; and that, if the constitution were ratified, certificates of election should be issued to the persons chosen. Jour. Const. Con. 772, 780.

The constitution was ratified, and the petition alleged that the judges of the Court of Appeals were elected to their positions on the third Tuesday in February, 1876, and that the Court of Appeals was organized on the 6th of May of that year, from which counsel argues that the conclusion should be drawn that the present members of that court are not even officers *de facto*. The suggestion requires no observations here.

We repeat, that as the District Court had jurisdiction over the person of the petitioner and the offence with which he stood charged, it had jurisdiction to determine the applicatory law, and this involved the determination of whether particular statutory provisions were applicable or not, and hence, if the question were properly raised, whether a particular statute or statutes had been enacted in accordance with the requirements of the state constitution.

It is unnecessary to enter upon an examination of the rul-

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ings in the different States upon the question whether a statute duly authenticated, approved and enrolled can be impeached by resort to the journals of the legislature or other evidence, for the purpose of establishing that it was not passed in the manner prescribed by the state constitution. The decisions are numerous, and the results reached fail of uniformity. The courts of the United States necessarily adopt the adjudication of the state courts on the subject. *South Ottawa* v. *Perkins*, 94 U. S. 260; *Post* v. *Supervisors*, 105 U. S. 667; *Railroad Co.* v. *Georgia*, 98 U. S. 359.

In *Town of South Ottawa* v. *Perkins*, where the existence of a statute of Illinois was drawn in question, Mr. Justice Bradley, delivering the opinion of the court, said, 94 U. S. 268: "As a matter of propriety and right, the decision of the state courts on the question as to what are the laws of a State is binding upon those of the United States. But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the constitution of Illinois that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States. This subject was fully discussed in *Gardner* v. *The Collector*, 6 Wall. 499. After examining the authorities, the court in that case lays down this general conclusion: 'That whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any

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source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking, first, for that which in its nature is most appropriate, unless the positive law has enacted a different rule.' 6 Wall. 511. Of course, any particular State may, by its constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but, the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed."

And it has been often held by state courts that evidence of the contents of legislative journals, which has not been produced and made part of the case in the court below, will not be considered on appeal. *Illinois Central Railroad Co.* v. *Wren*, 43 Illinois, 77; *Bedard* v. *Hall*, 44 Illinois, 91; *Grob* v. *Cushman*, 45 Illinois, 119; *Hensoldt* v. *Petersburg*, 63 Illinois, 157; *Auditor* v. *Haycraft*, 14 Bush, 284; *Bradley* v. *West*, 60 Missouri, 33; *Coleman* v. *Dobbins*, 8 Indiana, 156.

The distinction is recognized between matters of which the court will take judicial cognizance "immediately, *suo motu*," and those which it will not notice "until its attention has been formally called to them." Gresl. Eq. Ev. 292, 306. As to the last, Mr. Gresley says: "It will not point out their applicability nor call for them, but if they are once put in by either party it will investigate them, and will bring its own judicial knowledge to supply or assist their proof, and will then adopt them as its own evidence independently of the parties." *Jones* v. *United States*, 137 U. S. 202, 216.

As a statute duly certified is presumed to have been duly passed until the contrary appears, (a presumption arising in favor of the law as printed by authority, and in a higher degree, of the original on file in the proper repository,) it would seem to follow that wherever a suit comes to issue, whether in the court below or the higher tribunal, an objection resting upon the failure of the legislature to comply with the provisions of the constitution, should be so presented that the adverse party may have opportunity to controvert the allega-

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tions and to prove by the record due conformity with the constitutional requirements. *People* v. *Supervisors of Chenango*, 8 N. Y. (4 Selden) 317, 325.

By the constitution of Texas, each house of the legislature must keep a journal of its proceedings and publish the same, and the yeas and nays of either house on any question shall, at the desire of three members present, be entered on the journals, (Art. III, sec. 12;) no law shall be passed except by bill, and no bill shall have the force of law until it has been read on three successive days in each house and free discussion allowed thereon, but in case of imperative public necessity, (which necessity shall be stated in a preamble or the body of the bill,) four-fifths of the house in which the bill may be pending may suspend this rule, the yeas and nays being taken on the question of suspension, and entered upon the journal, (secs. 30, 32;) no bill shall be considered unless it has first been referred to a committee and reported thereon; and no bill shall be passed which has not been presented, referred and reported at least three days before final adjournment, (sec. 37;) the presiding officer of each house shall in the presence of the house over which he presides, sign all bills, and the fact of signing shall be entered on the journals, (sec. 38;) no law passed by the legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency the legislature by a vote of two-thirds otherwise direct, said vote to be taken by yeas and nays and entered upon the journals, and the emergency to be expressed in a preamble or the body of the act. (Sec. 39.)

By the law prior to 1876, the journals of the respective houses were required to be furnished to the public printer for the purpose of being printed, by the clerical officers of each house, (Paschall's Dig. § 4872;) and the Secretary of State was required to distribute the printed journals, (Id. § 5092;) and similar provision was made by the act of June 27, 1876, (Laws Texas, 1876, p. 36,) as also by the Revised Statutes of 1879, (Rev. Stats. p. 577, § 4012 *et seq.*) When printed, the manuscript journals were to be returned and filed in the archives

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of the legislature. Paschall, § 4872; Laws Texas, 1876, p. 36. It was the duty of the Secretary of State to keep, publish and distribute the laws. Paschall's Dig. §§ 5091, 5092, 4872 *et seq.*; Laws Texas, 1876, pp. 35, 313; Rev. Stats. 1879, pp. 394, 577, § 2722 *et seq.*

The Revised Statutes of Texas containing the codes in question were officially published in 1879, with the certificate of the Secretary of State as to the date when the law enacting them went into effect, and that the volume was a true and correct copy of the original bills on file in his department. For eleven years prior to the conviction of Duncan, these codes had been recognized and observed by the people of Texas; had been amended by the legislature, and republished under its authority; and their provisions had been repeatedly construed and enforced by the courts as the law of the land.

In *Usener* v. *The State*, 8 Texas, App. 177, the validity of the Penal Code in respect of its adoption by the legislature was passed upon and the law upheld; and that case was quoted with approval in *Ex parte Tipton*, 28 Texas, App. 438, a decision rendered as late as February, 1890. This decision ruled that an authenticated statute should be regarded as the best evidence that the required formalities were observed in its passage, and that the courts would not exercise the power of going behind it and inquiring into the manner of its enactment; and *Blessing* v. *Galveston*, 42 Texas, 641; *Central Railway Co.* v. *Hearn*, 32 Texas, 546; and *Day Co.* v. *The State*, 68 Texas, 526, were cited in support of the proposition. In one of these cases it was decided that the judicial department should not disregard and treat as a nullity an act of the legislature, because the journals of one or both houses failed to show the passage of the bill in strict conformity with all the directions contained in the constitution; and in another, that it would be conclusively presumed that a bill had been referred to a committee and reported on before its passage, as required by the constitution.

The language of the court in *State* v. *Swift*, 10 Nevada, 176, was quoted approvingly in *Usener* v. *The State*, and repeated in *Ex parte Tipton*: "Where an act has been passed by the

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legislature, signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, it constitutes a record which is conclusive evidence of the passage of the act as enrolled. Neither the journals kept by the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received in order to show that an act of the legislature, properly enrolled, authenticated, and deposited with the secretary of state, did not become a law. This court, for the purpose of informing itself of the existence or terms of a law, cannot look beyond the enrolled act, certified to by those officers who are charged by the constitution with the duty of certifying and with the duty of deciding what laws have been enacted."

In Usener's case, the court declared that, although not feeling in duty bound to do so, yet it had nevertheless examined the journals of the two houses, with regard to the bill entitled "An act to adopt and establish a Penal Code and a Code of Criminal Procedure for the State of Texas," and arrived at the conclusion that the act had received the legislative sanction in strict conformity with the constitution, so that if driven to such examination, the court was unhesitatingly of opinion that there would be no difficulty in the way of establishing that fact by them in every essential particular.

It is insisted that the extent of the disregard of constitutional requirements was not fully developed in that case, and that its authority was overthrown by *Hunt* v. *The State*, 22 Texas, App. 396. But we are not called on to conclude how this may be or to anticipate the ultimate judgment of the courts of Texas, if they consider the controversy still an open one.

If the question of the invalidity of the codes was presented to the District Court of Maverick County, it must be assumed that it adjudged in favor of their validity, and as the case has been carried to the Court of Appeals, that it will there be adjudicated in accordance with the law of the State, and when so determined it is entirely clear that that adjudication could not be reviewed by the Circuit Court, or by us, on *habeas corpus*. And the result must be the same if the question has not been raised by the petitioner in the state courts.

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We may remark in conclusion that the magnitude of the operation of the objection to these statutes does not affect the principles by which the result is reached. This is not the case of a system of laws attacked upon the ground of their invalidity as the product of revolution.

By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

In *Luther* v. *Borden*, 7 How. 1, it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government, or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department, and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that, as the Supreme Court of Rhode Island, holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decisions of the state courts on questions which concern merely the constitution and laws of the State. Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution.

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of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions. Webster's Works, vol. 6, p. 217.

Discursive as are the views of petitioner's counsel, no violation of these fundamental principles in this instance is or could be suggested.

The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction.

We cannot perceive that petitioner is being otherwise dealt with than according to the law of the land.

The judgment of the Circuit Court is *Affirmed.*

LEEPER *v.* TEXAS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

No. 1239. Argued December 17, 18, 1890. — Decided March 30, 1891.

It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken.

To give this court jurisdiction to review the judgment of a state court

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Statement of the Case.

under section 709 of the Revised Statutes, because of the denial by the state court of any right, title, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way.

Whether statutes of a legislature of a State have been duly enacted in accordance with the requirements of the constitution of such State, is not a Federal question, and the decision of state courts as to what are the laws of the State is binding upon the courts of the United States.

By the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.

PLAINTIFFS in error were arraigned in the District Court of Coryell County, Texas, upon an indictment reading as follows: "In the name and by the authority of the State of Texas, the grand jurors for the county of Coryell, State aforesaid, duly organized as such at the January term, A.D. 1890, of the District Court for said county, upon their oaths in said court present that Jim Leeper and Ed. Powell, on or about the 17th day of December, A.D. one thousand eight hundred and eighty-nine, in the county of Coryell and State of Texas, did then and there, with malice aforethought, kill and murder J. T. Mathis, by then and there shooting him, the said J. T. Mathis, with a pistol, contrary to law and against the peace and dignity of the State;" and severally pleaded not guilty.

The cause being called for trial, the defendants made an application for a continuance, which was overruled, whereupon trial was had before a jury duly empanelled, which found each of the defendants guilty of murder and assessed his punishment at death, and judgment was entered accordingly. No motion to quash the indictment was made, nor objection raised thereto in the progress of the trial. But exceptions were taken to the action of the District Court in overruling the application of defendants for a continuance;

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in refusing to quash a special venire issued in the case; in the admission of testimony of other distinct offences committed near the scene of the murder and immediately afterwards; in the admission of testimony that upon an inspection of the body of one of the defendants after he had been arrested, his shirt having been taken off by the jailer, marks or bruises were found thereon, indicating that he had been struck one or more blows, which tended to corroborate the testimony of one of the witnesses; and to the failure of the court to charge in relation to murder in the second degree. Defendants moved for a new trial on the ground of error in these rulings, and also because one of the jurors was not qualified as such under the laws of Texas, in that he was not a freeholder in the State of Texas, although he had assumed to be such on his *voir dire*, and the fact was not discovered until after the trial, wherefore it was claimed defendants had not had a trial in accordance with law; and because the verdict was contrary to the law and the evidence. The motion for a new trial having been overruled, the cause was taken by appeal to the Court of Appeals of the State of Texas, and errors therein assigned, raising the same points as on the motion for new trial, and error in the action of the court in overruling that motion. The cause was submitted to the Court of Appeals on oral arguments and briefs and the judgment affirmed, the opinion being delivered by Judge Willson. A rehearing was afterwards applied for and the application heard on oral arguments and briefs, and overruled. An opinion was delivered on this motion by Judge Willson, and a dissenting opinion by Judge Hurt, who concurred in the views of the majority, except upon the question of the disqualification of the juror. These opinions are transmitted as part of the record.

The court decided that the evidence tending to show assaults upon other parties by the defendants, almost simultaneously with the assault made by them upon the deceased and at the same place, in pursuance of a general design to rob the parties assaulted, was admissible, such assaults being part of the *res gestæ;* that it did not appear that one of the defendants was compelled to expose his body, or that his shirt was removed

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without his consent, nor was it shown what injury or prejudice might have been caused by the admission of the testimony as to the marks or bruises upon his body, and that in the manner in which the ruling of the court in relation to this matter was presented, it did not appear that any material error, if any at all, had been committed; that there was no evidence in the record that the defendants were drunk at the time of the homicide, and that the District Court was not called upon to instruct as to the law where a homicide is committed by a person who at the time is in a state of intoxication; that it was apparent, in view of the evidence adduced on the trial, that the testimony set forth in the application for a continuance was not probably true, and the refusal of the application did not afford good ground for a new trial; that under the statute a new trial could not be granted because of the disqualification of a trial juror; and that it did not appear that injury had resulted to the defendants by reason of such juror serving. Some other matters were also considered, and the court held that there was "no error apparent of record for which the conviction should be disturbed."

The objection to the special venire was that the sheriff, "although present in court, was not sworn and instructed, cautioned and directed, by the court as to the manner in which said venire should be by him selected, as required by law," but the bill of exceptions showed that the sheriff was ill and that the talesmen were summoned by two of his deputies, who were duly sworn, cautioned and instructed, and the opinion of the Court of Appeals makes no reference to the matter.

The first ground assigned for the motion for rehearing was in these words:

"Because the court erred in holding as sufficient in substance and sustaining the bill of indictment in this case, the said bill of indictment, as is apparent on its face, not alleging all of the material elements of the crime of murder in the first degree or of any other crime, and for that reason being illegal and in contravention of the constitution of the State of Texas and of the United States, of which these appellants are now and

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were at the time of their trial and conviction native and *bona fide* citizens."

This is the earliest suggestion of the existence of a Federal question in the cause. After the application for a rehearing had been disposed of, the defendants, as is stated in a bill of exceptions, "gave notice in open court of an appeal to the Supreme Court of the United States of America, and requested that the same be entered upon the minutes of this court, which action this court then and there refused," and defendants excepted.

A petition for a writ of error from this court was then presented and allowed by the presiding judge of the Court of Appeals. The petition set up in substance the same grounds which subsequently appeared in the assignment of errors, and averred that upon the trial there was "drawn and called in question the construction of certain clauses of the Constitution of the United States, and the decision of said cause was adverse and against the rights, privileges, immunities and exemptions so especially set up and claimed under those clauses of the said Constitution of the United States."

The errors assigned here are that the indictment was drawn under a certain act of the legislature of Texas, passed March 26, 1881, which was repugnant to the Fifth Amendment, and in contravention of the Fourteenth Amendment to the Constitution of the United States; that the indictment, if charging any offence, charged no higher one than that of murder in the second degree, the punishment for which under the Penal Code was imprisonment for a term of years, and, in the punishment inflicted, plaintiffs in error were not accorded due process of law, nor the equal protection of the laws; that the action of the Court of Appeals in relation to the disqualification of the juror was in contravention of the Sixth Amendment to the Constitution of the United States, and deprived plaintiffs in error of their lives without due process of law, in violation of the Fourteenth Amendment; that the inspection of the person of one of the plaintiffs in error, and evidence of the results of such inspection, was in contravention of the Fifth Amendment, and not due process of law within the

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Fourteenth Amendment; and that the denial of the right of appeal was a denial to plaintiffs in error of rights guaranteed to them by the Constitution of the United States and the Fourteenth Amendment thereof.

Upon the argument, although no error was assigned in relation thereto, it was contended that the Penal Code and the Code of Criminal Procedure of Texas were not properly enacted, either in whole or in part, under the constitution of Texas in that behalf.

Mr. William S. Flippin and *Mr. G. P. M. Turner* for plaintiffs in error.

Mr. R. H. Harrison for defendant in error.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken; *Manning* v. *French*, 133 U. S. 186; *Clark* v. *Pennsylvania*, 128 U. S. 395; *Warfield* v. *Chaffe*, 91 U. S. 690; *Butler* v. *Gage*, 138 U. S. 52: That to give this court jurisdiction to review the judgment of a state court under section 709 of the Revised Statutes, because of the denial by the state court of any right, title, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way; *Spies* v. *Illinois*, 123 U. S. 131, 181; *Baldwin* v. *Kansas*, 129 U. S. 52; *Chappell* v. *Bradshaw*, 128 U. S. 132: That whether statutes of a legislature of a State have been duly enacted in accordance with the requirements of the constitution of such State, is not a federal question, and the decision of state courts as to what are the laws of the State is binding upon the courts of the United States; *South Ottawa* v. *Perkins*, 94 U. S. 260, 268; *Post* v. *Supervisors*, 105 U. S. 667; *Norton* v. *Shelby County*, 118 U. S. 425, 440; *Railroad Co.* v. *Georgia*, 98 U. S. 359, 366; *Baldwin* v. *Kansas*, 129 U. S. 52, 57: That by the Fourteenth Amendment the

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powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Hurtado* v. *California*, 110 U. S. 516, 535, and cases cited.

In view of these repeatedly adjudicated propositions, we do not care to discuss at length the points urged by plaintiff in error.

Our jurisdiction in this class of cases is properly invoked by writ of error, not by appeal. The validity of the enactment of the Texas codes is not open to inquiry. *In re Duncan*, *ante*, 449.

The sufficiency of the indictment, the degree of the offence charged, the admissibility of the testimony objected to, and the alleged disqualification of the juror because he was not a freeholder, were all matters with the disposition of which, as exhibited by this record, we have nothing to do.

We find nothing special, partial or arbitrary or in violation of fundamental principles in the criminal laws of the State of Texas, involved, and we perceive no ground for holding that the proceedings complained of, which were had in the ordinary administration of those laws, amounted to a denial by the State of due process of law to these parties, or of some right secured to them by the Constitution of the United States. *In re Kemmler*, 136 U. S. 436, 449; *Caldwell* v. *Texas*, 137 U. S. 692. Although no right, title, privilege or immunity was specially set up or claimed at the proper time and in the proper way, and no Federal question was passed upon by the state courts or raised, except by the general averment in the petition for rehearing that the indictment was so defective that it, or the statute which authorized it, contravened the Constitution, yet, as full argument was permitted at the bar, upon the assumption that the writ of error was providently issued, we will instead of dismissing the writ, affirm the judgment.

Judgment affirmed.

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DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY v. CONVERSE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 223. Argued March 18, 19, 1891. — Decided March 30, 1891.

The court may withdraw a case from the jury, and direct a verdict for plaintiff or defendant, as the case may be, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it.

The severing of a train of cars in motion on a railroad in the night time, leaving a part, uncontrolled except by ordinary brakes, to run across a public highway at grade, without warning by either flagman, bell, whistle or in some other effective way, that they were approaching, is a disregard of the rights of persons using the highway, and it justified the court in saying, as matter of law, that it constituted negligence on the part of the railroad company, for which the plaintiff could recover unless he had been guilty of contributory negligence.

The instructions of the court properly submitted to the jury the question whether the plaintiff was guilty of contributory negligence; and, the jury having passed upon that issue, this court cannot review their finding.

The rulings of the court admitting or refusing to admit evidence on sundry points were no error, having rightly held the defendant guilty of negligence, leaving the jury to determine whether the plaintiff was guilty of contributory negligence.

THE case is stated in the opinion.

Mr. J. D. Bedle for plaintiff in error.

Mr. James B. Vredenburgh for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The object of this action is to recover damages for injuries, in person and property, alleged to have been sustained by the defendant in error (who was the plaintiff below) in consequence of the negligent manner in which the cars of the plaintiff in error were operated on the occasion when such injuries were

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received. The jury returned a verdict against the railroad company for $14,000. That amount being regarded by the court as excessive, the plaintiff remitted all of it except seven thousand five hundred dollars; and judgment was entered for the latter sum.

While there was some conflict in the evidence relating to certain matters, the following facts were clearly established: The plaintiff at the time of the injuries in question, and for ten years previous thereto, was the county physician of Hudson County, New Jersey. In the discharge of his duties, he went daily from Jersey City to the County Farm on which were located a penitentiary, insane asylum, and almshouse belonging to the county, and which were reached by a public road crossing the Boonton Branch of the Delaware, Lackawanna and Western Railroad at Secaucus station in the vicinity of the County Farm. That road, commonly called the county road, is built through meadow lands which are unoccupied, except as they have been appropriated and used for the purposes of the railroad company. There is, substantially, no travel upon it except by those going to and from the County Farm. About a half-dozen wagons or vehicles on an average pass over the crossing every night. The road is from twenty-five to thirty feet in width and macadamized, and without a fence upon either side of it. At the crossing in question there are two main tracks of the railroad, one called the east-bound and the other the west-bound track, and five other tracks, two on the south side of the east-bound track, and three on the north side of the west-bound track.

The plaintiff, on the 13th day of March, 1886, went from Jersey City to the County Farm, over this county road, in a four-wheel buggy or phaeton, having a top or hood that could be let down or raised. He reached the County Farm, crossing the railroad tracks at Secaucus station, between 6 and 7 o'clock in the evening of that day, and started back to Jersey City about 8 o'clock. As he approached the station, on his return, sitting in his buggy, with the top up, and moving at an easy gait, he observed, about fifteen minutes after 8 o'clock, at a distance of one hundred feet or less, a train of freight cars,

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drawn by a locomotive engine, coming on the defendant's road from the west. The train, just before reaching the point where the county road crossed the railroad tracks, was severed by the direction of those in charge of it, the engine, with the twelve cars next to it, going ahead over a switch into the railroad yard, while the other cars, twelve in number, with a caboose attached to them, making what is called a "running switch," were left to follow, by their own momentum, without being controlled otherwise than by ordinary brakes. When the engine and cars constituting the first section of the train passed the county road, there was a gap between the two sections of the severed train, the rear section being about ninety feet behind the other and passing across the county road at the rate of about ten miles an hour. The plaintiff attempted to cross the railroad tracks as soon as the engine and the cars attached to it had cleared the county road. There were neither gates, lights, nor flagman at the crossing. There was no light on the front car of the rear section of thirteen cars when they reached the crossing. The only light upon the cars of that section when they reached the crossing was in the caboose. Before reaching the crossing, a brakeman on the rear section had a lantern that was placed on the platform at the rear end of the first car of that section, which platform was, however, two feet below the roof of the car. This light was extinguished by the wind before the rear section of the train reached the crossing. After the plaintiff got on the railroad tracks with his buggy, but before reaching the east-bound main track, he discovered the cars constituting the rear section of the train, distant but a few feet, coming down upon him and too close to be avoided. The train hit his buggy, entirely destroying it and seriously, if not permanently, injuring him.

Upon, substantially, these facts, about which there could not be any dispute, the court instructed the jury, as matter of law, that the railroad company was negligent in respect to its duty to persons travelling upon the public road in question; and that the plaintiff was entitled to recover damages for any injuries sustained by him as the result of such negligence, unless it appeared that he contributed to such injuries by his own carelessness.

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It is contended that the court erred in not submitting to the jury the issue as to defendant's negligence. Undoubtedly, questions of negligence, in actions like the present one, are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Griggs* v. *Houston*, 104 U. S. 553; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241; *Schofield* v. *Chicago & St. Paul Railway Co.*, 114 U. S. 615, 618. "It would be an idle proceeding," this court said in *North Penn. Railroad* v. *Commercial Bank*, 123 U. S. 727, 733, "to submit the evidence to the jury when they could justly find only in one way." In the present case, it was incumbent on the plaintiff, as a condition of his right to recover, to prove that the defendant was guilty of negligence, resulting in his being injured, and, that issue being in his favor, he was entitled to a verdict unless it appeared that his own negligence substantially contributed to his injury. If the evidence was so conclusive against the defendant, upon the question of its negligence, that the jury could not reasonably find to the contrary, it was competent for the court, within the doctrines of the cases above cited, to so instruct them, leaving the jury to determine the question of the plaintiff's negligence, in respect to which the evidence was conflicting.

The inquiry, therefore, is, whether the court erred in holding, as matter of law, under the evidence, that the defendant was guilty of negligence. Upon this question we entertain no doubt. While those using a public highway are under a duty to keep out of the way of railroad cars crossing it, and to exercise to that end such care as the circumstances make necessary, the railroad company, in moving cars upon its road,

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is bound to observe like care towards those who, while travelling upon such highways, whether on foot or in vehicles, are obliged to pass over its tracks. The right of a railroad company to the use of its tracks for the movement of engines and cars is no greater in the eye of the law than the right of an individual to travel over a highway extending across such tracks. The former is granted, subject to the condition, necessarily implied, that it shall be so used as not unreasonably to interfere with or abridge the latter. The obligation to use one's property in such a manner as not to injure that of others rests equally upon corporations and individuals. The duty of railroad companies whose tracks cross public highways at grade to give warning to those travelling upon them has been under consideration in many adjudged cases. When the subject is regulated by statute it may not be difficult, in a particular case, to determine whether the railroad company has performed its duty in that regard to the public. If there be no statute prescribing in what mode the necessary warning shall be given when a train of cars approaches a public highway that crosses a railroad track, at grade, the question of negligence must be determined by the special circumstances of each case. In some localities, in thickly settled communities, greater vigilance and more safeguards are required upon the part of the railroad company than would be necessary in other localities. What would be due care in one locality might be negligence in another. A very high degree of caution and circumspection is required under some circumstances. Without attempting to formulate a general rule applicable in every case of injury to person or property, it is sufficient here to say that the severing of defendant's train of cars in the night time, leaving a part of them, uncontrolled otherwise than by ordinary brakes, to run across a public highway, at grade, without some warning, by a flagman or by bell or whistle, or in some other effective mode, that they were approaching, was in such obvious disregard of the rights of persons using that highway, that the court was justified in saying, as matter of law, not simply that such facts were evidence of negligence, but that they constituted negligence, upon

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the part of the company. It was justified in so instructing the jury, because every one knows, and therefore the court below knew, that such use of the defendant's tracks, where they crossed the county road, unnecessarily endangered the safety of any one who, at the time, crossed the railroad tracks while travelling on that highway. The county road upon which the plaintiff was travelling was not, it is true, much used by the general public. But that fact only affects the degree of care the defendant was bound to observe, and does not establish a right to have its cars approach the crossing, where the plaintiff was hurt, and over which the public were entitled to pass, as if there were no highway there at all. The court, in our judgment, did not err in holding, as matter of law, upon the undisputed facts in the case, that the defendant was guilty of negligence in the particulars to which we have adverted.

The next question is as to the instructions relating to the alleged contributory negligence upon the part of the plaintiff. In *Railroad Co.* v. *Jones*, 95 U. S. 439, 442, it was said that, where the damage was occasioned entirely by the negligence or improper conduct of the company, the plaintiff is entitled to recover; but that, where "the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that, but for such negligence or want of care and caution on his part, the misfortune would not have happened," he could not recover. So, in *Railroad Co.* v. *Houston*, 95 U. S. 697, 702, which was an action for damages against a railroad company, upon the ground of negligence, it was said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the employés in those particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she

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omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." Again in *Kane* v. *Northern Central Railway Co.*, 128 U. S. 91, 94, — which was an action by an employé of a railway company to recover damages for personal injuries alleged to result from its negligence, — this court said "that an employé is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so." See also *District of Columbia* v. *McElligott*, 117 U. S. 621, 633. These principles are applicable to the issue in this case as to contributory negligence.

The jury were told, that, while it was the duty of the railroad company to exercise great care to warn travellers on a public highway of approaching trains, it was an equally imperative duty in travellers to exercise the same degree of care to avoid and keep off the railroad tracks when trains are approaching and crossing; that if the plaintiff advanced to and upon the tracks of the railroad without the exercise of such care to discover the approach of trains, or attempted intentionally to pass in front of a train within dangerous proximity, he was guilty of negligence; that when at a safe distance from the tracks, where the opportunity of seeing was best, it was his duty, especially in view of the dangerous character of this crossing, to stop, look up and down the road, and listen for trains; and that if he did not so stop, look and listen, he was guilty of carelessness; that if, after crossing the first or second track, the plaintiff, by the exercise of such care, could have discovered the approach of the train which struck him, he was guilty of carelessness in not discovering it and stopping short of the east-bound track; that the jury must judge of the plaintiff's opportunity of seeing whether standing cars were in the way, and, if they were, whether he could have seen over them by standing up in his carriage; that if he

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could, he should have stood up; that of all this the jury must judge; and that if they found from the evidence that the plaintiff was guilty of such negligence, he could not recover. Whatever objections the plaintiff might have urged against these instructions, surely the defendant, upon the issue as to his negligence, was not prejudiced by what was thus said by the court to the jury. The jury have found that the plaintiff was not guilty of contributory negligence. That question was properly submitted to them upon all the evidence, which was contradictory, and as no error of law, in reference thereto, was committed to the prejudice of the defendant, we have no authority to review their finding in that respect. *Parsons* v. *Bedford*, 3 Pet. 433, 447; *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31.

It is assigned for error that the court allowed the plaintiff, against the objection of the defendant, to prove that the highway in question was established before the railroad was constructed. We do not presume that this fact was at all important in the case. When the witness was asked whether the public highway was there before the railroad, the court properly observed that the responsibility of the defendant was not increased or diminished, whether the fact was one way or the other. But it permitted the witness to be asked whether the county road was an old and well-established highway. The question was then changed into an inquiry simply as to how long that highway had been established. The witness answered that he went over it in 1857. The object of this proof was, as we suppose, to show that the defendant could not be ignorant of the fact that at the crossing in question there was a public highway. In that view the evidence, though not important, was not incompetent. There was no dispute as to the existence of the county road as a public highway, and what the witness said, even if incompetent as evidence, could not possibly have affected the result.

Another error assigned is the refusal of the court to allow proof by the defendant of the fact that the manner in which the plaintiff crossed the railroad tracks, between six and seven o'clock in the evening, on his way from Jersey City to the

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County Farm, showed negligence upon his part. Plainly, this evidence was irrelevant. It did not, in anywise, illustrate the issue as to whether the defendant was guilty of negligence, or whether the plaintiff was guilty of contributory negligence two hours later in the evening, when the plaintiff, returning from the County Farm, attempted to cross the railroad tracks.

At the trial below the plaintiff recalled a witness, Stewart, in rebuttal, and was permitted, against the objection of the defendant, to propound this question: "Did Mr. O'Brien tell you that night what speed, in his judgment, the train that hit the Doctor was moving at the time it hit him?" The answer was: "Yes; he said about sixteen miles an hour, positively." The action of the court in permitting this question and answer is assigned for error. O'Brien was the defendant's night yard-master at the station, and had testified in chief for defendant that the rear section of the train, when it crossed the county road, was going about ten miles an hour. He denied, upon cross-examination, that he said to Stewart, the night of the accident, that the rear section of the train was moving at the rate of fifteen miles an hour, or that he used words to that effect. The object of the evidence to which the defendant objected was to impeach the credibility of O'Brien. It was competent for that purpose. But if it was not, the admission of it is not ground for reversal. Whether the train when it struck the plaintiff's buggy, was going at the rate of ten or sixteen miles an hour, the court rightly held the defendant guilty of negligence, leaving the jury to determine, upon the evidence, the question of plaintiff's contributory negligence.

We perceive no error in the judgment and it is

Affirmed.

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SNYDER *v.* FIEDLER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 231. Argued March 19, 1891. — Decided March 30, 1891.

The administratrix of her husband's estate commenced suit to recover a claim alleged to be due the estate. She resigned and was discharged, and an administrator *de bonis non* was appointed and qualified, and appeared and obtained leave to prosecute the suit. *Held*, that she was a competent witness for the plaintiff at the trial.

THE case is stated in the opinion.

Mr. Joshua D. Ball for plaintiffs in error. The court declined to hear further argument.

Mr. John P. Treadwell appeared for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The present action was brought April 30, 1885, in the Superior Court of Suffolk County, Massachusetts, by Marie R. Liebsch, administratrix of the estate of Francis J. Liebsch, her deceased husband, against the plaintiffs in error, administrators of the estate of C. Brown Snyder. Its object was to recover the sum of five thousand dollars alleged to have been delivered October 15, 1876, by Francis J. Liebsch to C. Brown Snyder, to be invested by the latter for the benefit of the former, but which the declaration alleged was never invested nor accounted for nor repaid to said Liebsch. The defendants denied all the material allegations of the declaration. The case having been removed from the state court on their petition, upon the ground of the diverse citizenship of parties, was docketed in the court below at its October term, 1885.

At a trial on the 9th of December, 1886, Marie R. Liebsch was called as a witness in her own behalf, as party plaintiff, to prove the delivery of the five thousand dollars to Snyder,

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the circumstances of such delivery and his promises in relation thereto. Objection having been made to her competency as a witness to those facts, the case, on motion of plaintiff's counsel, was withdrawn from the jury and continued. Subsequently, December 13, 1886, Marie R. Liebsch tendered to the proper court her resignation of the office of administratrix. The resignation was accepted on the same day, and the defendant in error appointed administrator *de bonis non*. On the 1st day of June, 1887, Fiedler, as such administrator *de bonis non*, filed a written motion asking leave to come in and prosecute the action in place of Marie R. Liebsch, resigned. This motion was allowed by the court "as of December 13, 1886, by consent of both parties."

At the next trial Mrs. Liebsch was offered as a witness in behalf of Fiedler, administrator *de bonis non*, to testify against the defendants in respect to transactions of herself and husband with Snyder, and to statements by the latter to them tending to sustain the cause of action set out in the declaration. The defendants objected to her competency as a witness to prove such transactions and statements, unless called by them, or required to testify thereto by the court. The objection was overruled, and she was permitted to testify as to those transactions and statements. Her testimony was material and she was the only witness called by the plaintiff, except one who testified as to the administration proceedings. The plaintiff's counsel claimed at the trial that $1400 had been paid to Mrs. Liebsch by Snyder in his lifetime, but after the death of Francis J. Liebsch, and that this payment should be deducted. There was a verdict and judgment in favor of the plaintiff Fiedler, administrator *de bonis non*, for $6684.

In the courts of the United States no person can be excluded as a witness in a civil action by reason of being "a party to or interested in the issue tried," except "that in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to

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testify thereto by the court." Rev. Stat. § 858; 12 Stat. c. 189, p. 588; 13 Stat. c. 210, § 3, p. 351; 13 Stat. c. 113, p. 533. This exception has no application in the present case. Upon the acceptance of Mrs. Liebsch's resignation as administratrix, and when the order was made allowing her successor, the administrator *de bonis non*, to prosecute the suit in her place, the action ceased to be one in which she was concerned as a "party," either within the meaning of the present statute, or within the rule, in force prior to its adoption, which excluded as a witness, without reference to his interest in the issue, one who was a party to the record. *De Wolf* v. *Johnson*, 10 Wheat. 367, 384; *Scott* v. *Lloyd*, 12 Pet. 145; *Stein* v. *Bowman*, 13 Pet. 209; *Bridges* v. *Armour*, 5 How. 91, 94. It is of no consequence that she stood upon the record as the original plaintiff who sought judgment against the personal representatives of Snyder. As she ceased before the final trial to be administratrix, and as no judgment could have been rendered in her favor, as administratrix, against the administrators of Snyder, she was competent, under the statute, to testify to any transaction with or statement by him relating to the matters in dispute. Her credibility, in view of all the circumstances, was for the jury. The result would not be different even if it had appeared that she was personally interested in the issue tried. *Potter* v. *National Bank*, 102 U. S. 163, 164.

Judgment affirmed.

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ELECTRIC GAS-LIGHTING COMPANY v. BOSTON ELECTRIC COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 232. Argued March 20, 1891. — Decided April 6, 1891.

Claims 2, 4 and 5 of reissued letters patent No. 9743, granted June 7, 1881, to the Franklin Electric Gas-Lighting Company, as assignee of Jacob P. Tirrell, the inventor, for improvements in electrical apparatus for lighting street lamps, etc., (the original letters patent, No. 130,770, having been granted to said Tirrell, August 20, 1872, and the application for the reissue having been filed February 21, 1881,) are invalid, as against the defendant's apparatus, constructed under letters patent No. 281,345, granted July 17, 1883, to the Boston Electric Company, as assignee of Charles H. Crockett, the inventor, on an application filed April 11, 1883, for improvements in electric gas-lighters.

The original patent and the reissue compared, as to the specification and the claims.

The state of the art at the date of the invention described in No. 130,770, set forth.

The history of the application for the reissue, given.

The delay of 8½ years in applying for the reissue is not explained; there was no inadvertence, accident or mistake; and the sole object of the reissue was to unlawfully expand the claims.

In equity for the infringement of letters patent. Decree dismissing the bill. Complainant appealed.

Mr. Edward P. Payson and *Mr. Edwin H. Brown* for appellant.

Mr. John E. Abbott and *Mr. John L. S. Roberts* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a bill in equity, filed in the Circuit Court of the United States for the District of Massachusetts, on the 1st of May, 1884, by the Electric Gas-Lighting Company, a Maine

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corporation, against the Boston Electric Company, a Massachusetts corporation, for the alleged infringement of claims 2, 4 and 5 of reissued letters patent No. 9743, granted June 7, 1881, to the Franklin Electric Gas-Lighting Company, as assignee of Jacob P. Tirrell, the inventor, for improvements in electrical apparatus for lighting street lamps, etc., the original letters patent, No. 130,770, having been granted to said Tirrell, August 20, 1872, and the application for the reissue having been filed February 21, 1881. The plaintiff became the owner of the reissued patent by assignment on the 6th of May, 1882. The defences set up in the answer are prior use, want of novelty and patentability, invalidity of the reissue and non-infringement. The Circuit Court dismissed the bill, (29 Fed. Rep. 455,) and the plaintiff has appealed to this court.

The alleged infringing apparatus is constructed under letters patent No. 281,345, granted July 17, 1883, to the defendant, as assignee of Charles H. Crockett, the inventor, on an application filed April 11, 1883, for improvements in electric gas-lighters.

The only difference of consequence between the original patent, No. 130,770, and the reissue, No. 9743, is in the claims, the text of the two specifications being almost substantially the same, and the drawings differing only as to scale. The specification is as follows, words in the original which are omitted in the reissue being here enclosed in brackets, and words found in the reissue and not found in the original being printed in italics; small letters, which designate parts of the drawings, being printed in italics in both of the specifications:

"Be it known, that I, Jacob P. Tirrell, *a citizen of the United States*, [of Charlestown], *residing in West Somerville*, in the county of Middlesex and State of Massachusetts, have invented certain new and useful improvements in electrical apparatus for lighting street lamps, etc., and I do hereby declare that the following is a full, clear and exact description of the same, reference being had to the accompanying plates of drawings. This invention relates to that class of electrical apparatus for lighting street lamps in which the current is successively thrown into the magnet at each burner, one after another; and

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under this invention the circuit-breaker is located at the burner, and, by the direct action of the current through the magnet located at the burner, the circuit-breaker and the valve to let on or turn off the gas are both operated, and the current, after the opening or closing, as the case may be, of the valve to one burner, is completely cut off from the magnet of such burner and thrown into the magnet of [the] next burner, and so on. In the accompanying plates of drawings the present invention is illustrated. In Plates 1 and 2, Figures 1 and 2 are elevations from different sides. In Plate 3, Fig. 3 is a partial plan view and horizontal section; Figs. 4 and 5, [detail] *detailed* views.

"A in the drawings represents a gas-burner, to which B is the feed pipe, provided with two horizontal platforms, C and D, for carrying the apparatus of this invention; E [is] a U magnet horizontally located and secured on the lower platform, C, with the pipe B in and between the legs F of the magnet; G [is] the armature properly located with regard to the magnet E and secured to the lower end of an upright lever, H, turning upon a fulcrum at I of the feed pipe B; J [is] the circuit-breaker, secured [in] *to* the upper end of the lever H and projecting upwards to the plane of *the* escape of the gas from the burner; K, a post in upper platform D, and in electrical connection with the earth. At the upper end of the post K is a horizontal platinum arm, *b*, against which rests the point *a* of the circuit-breaker J when the lever H is at rest; L [is] a spiral spring applied to lever H to throw back the armature G from the magnet E; O [is] an upright arm. This arm O, at its lower end, is hung upon a fulcrum, *d*, of an insulator block, *e*, on platform C, and at its upper end it is in a position to bear against the periphery of a sector-wheel, *f*, fixed to the spindle *g* of valve in gas-pipe B; *c* [is] a bent spring applied to arm O to hold it against the sector-wheel *f*, and when escaping from the periphery thereof, to swing it on its fulcrum. The arm O at P, between its two ends, is insulated. *h* is a finger-piece projecting horizontally from lower end of arm O. This finger-piece *h*, at its outer end, lies in a position between the two pins *l* and *m*, projecting horizontally

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one above the other from the block *e*. The lower pin *l* extends wholly through the block *e*, and similarly projects therefrom [upon] *from* its other side, being there lettered as l^2. The upper pin, *m*, only enters the block; but on the opposite side of the block thereto a similar pin m^2, is located, also only entering the block. Q is an arm similarly constructed, arranged and hung on the block *e*, to the arm O. This arm Q is in a position to bear upon the periphery of a sector-wheel, *n*, fixed to the gas-valve spindle *g*, and for its finger-piece h^2 to lie in and between the projecting pins l^2 and m^2 of the block *e*. The sector-wheel *n* is back of the sector-wheel *f*. The two sector-wheels *f* and *n* are of equal diameter, of an equal length of arc — that is, a half of a circle. The two together complete the circumference. The relative location of the sector-wheels *f* and *n* on the valve-spindle is such that with the arm O on the periphery of [its] *the* sector-wheel *f* the arm Q will be off the periphery of its sector-wheel *n*, and vice versa; and the purpose of the said sector-wheels is to turn their respective arms O Q so as to bring about a bearing between their respective finger-pieces *h* h^2 and the lower pins *l* l^2 and also to allow the springs applied to the said arms O Q to react and bring their finger-pieces into contact with the upper pins *m* m^2. R is a ratchet-wheel secured to gas-valve spindle back of inner sector-wheel *n*; and S a spring pawl hung to lever H and arranged from the movement of such lever to act upon the ratchet-wheel R to turn it in the direction of the arrow, Fig. 1, Plate 1. In lieu of a ratchet-wheel, a friction-wheel and clutch may be employed, such as shown in Fig. 5. M and N are wires leading from the electric battery employed. The wire M is to let on and the wire N to shut off the gas at the burner A. The current is thrown into the one or the other of said wires by means of a double switch such as is employed ordinarily in electrical gas-lighting *apparatus* [apparatuses], and, therefore, needs no particular description herein. The wire M connects with the arm O and the wire N with the arm Q. T is a wire connecting lower pin *l* with magnet E; and U a wire connecting magnet with circuit-breaker J. V and W are wires respectively connected with upper pins *m* and m^2, from which

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they are to lead to the next burner, and to such burner become the letting-on and turning-off wires, as the wires M and N to the burner A.

"The position of the several parts composing the mechanism hereinabove described is at all times, if at rest, substantially that shown in Fig. 1, Plate 1, and only differs therefrom in any condition of rest, in the relative position of the two arms O Q, according as the one or the other is bearing on its respective sector-wheel *f or n*. By the shown positions of the two arms O and Q, the finger-piece *h* of arm O is against the lower pin *l*, and the finger-piece h^2 of arm Q against the upper pin m^2 of block *e*. This relative contact with the pins $l\ l^2\ m\ m^2$ of the finger-pieces to the two arms is always maintained, they never being both at the same time in contact with the lower pins $l\ l^2$, or the upper pins $m\ m^2$, but always the one with a lower pin and the other with an upper pin alternately. [With the arms O and Q in the relative positions described and shown, if now] *If, now, with the arms O and Q in the relative positions described and shown*, a current of electricity be thrown into the wire M, (which, as stated, is the letting-on wire,) it is obvious it will pass into the magnet, (the connection being through arm O, finger-piece *h*, pin *l* and wire T,) thence to the circuit-breaker J; and then, as the circuit is complete, the armature G will be drawn towards the magnet, turning its lever H on its fulcrum, which carries the circuit-breaker J beyond the end of the platinum arm *b*, breaking thereby the circuit and emitting an electric spark. This breaking of the circuit destroys the attractive force of the magnet, and leaves the lever H to be pulled backward by the spring L, which backward movement of the lever completes the circuit by bringing the circuit-breaker into contact with the platinum arm *b*, when another attraction of the armature G occurs, again breaking the circuit, emitting a spark, and so on, as before. By this alternate forward and backward movement of the lever H, the ratchet-wheel R on gas valve-spindle is intermittently rotated, carrying with it the valve-spindle *g* and sector-wheels *f n*. If this rotation of the valve-spindle *g* be continued sufficiently, the periphery of the sector-wheel *f* will be

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carried beyond the arm O, leaving it free for its spring to act upon it, and thus to throw its finger-piece *h* out of contact with the lower pin *l*, and into contact with the upper pin *m*, and the periphery of the sector-wheel *n* will be brought to bear upon the arm Q, throwing its finger-piece h^2 out of contact with the upper pin m^2, and in contact with the lower pin l^2.

"With the movement of the sector-wheel *f* beyond its arm O, and of the sector-wheel *n* on to its arm Q, as above described, results have been effected as follows: First, the gas-valve or stop-cock has been opened to its fullest extent, and as, at each stroke of the lever H, caused by the successive attraction of the armature, the circuit was broken and a spark emitted, it is obvious the gas necessarily must have been lighted; second, the current of electricity through wire M is cut off from the magnet E and thrown into the wire V leading to the magnet of the next burner, and which, as before stated, is the letting-on wire to such burner; third, a connection has been established between the magnet E and the shutting-off wire N, so that, when desired to shut off the gas from the burner A, the operator has only to make the necessary connection between battery and shutting-off wire. The connection between *the* shutting-off wire N and *the* magnet is through arm Q, its finger-piece h^2, pin l^2 and wire T. In shutting off the gas at the burner, the operation of the parts is precisely similar to the letting-on of the gas, and therefore needs no particular description; and on its completion the arm Q escapes from its sector-wheel *n*, and the arm O passes on to its sector-wheel *f*, re-establishing the connection between letting-on wire and magnet, as before. Completing the shutting-off of the gas at one burner throws the current into the wire W leading from such burner A to the next burner, which wire W to the said next burner is the shutting-off wire. In Fig. 4, the valve in gas-pipe is shown in detail, and [it] is such that in a half-turn of the spindle *g* the gas will be let on, and, continuing the turn, shut off. The location of the circuit-breaker at the gas-burner is such that, as it breaks the circuit by escaping from the platinum arm *b*, the spark emitted will be sufficiently near to the escaping gas [as] to ignite the same, and it is desirable that the movement to let

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on the gas should be so divided as to emit a sufficient number of sparks to insure the lighting of the gas. I do not claim turning on and off *the* gas by means of a step-by-step motion, as such is not my invention. Having thus described my invention [I shall state my claims] *what I claim is* as follows."

The trivial verbal changes in the specification of the reissue show that there were no defects or insufficiencies in the specification of the original patent, which required correction; and that the sole object of the reissue was to multiply and alter the claims, which were increased in number from three to six.

The claims of the original patent were as follows: "1. A circuit-breaker, located at the burner and operated automatically, substantially as described. 2. In combination with the above a lever, adapted and arranged to open and close the stop-cock or valve of the burner and carrying the circuit-breaker, substantially as herein described. 3. The arms O Q, sector-wheels f n, pins l l^2 m m^2, wires M N, magnet E, lever H, carrying armature G, circuit-breaker J, and pawl S, and the ratchet-wheel R, all combined and arranged together and applied to a gas-burner for operation substantially as and for the purposes set forth."

The claims of the reissue are as follows: "1. In an apparatus for lighting gas by electricity, the combination of two wires through which currents of electricity are passed, an electro-magnet electrically connected therewith and attracting an armature which actuates mechanism, substantially as described, for automatically turning on the gas and lighting the same by an electric spark at the tip of the gas-burner, and also for turning off the gas to extinguish the light, substantially as described. 2. In an apparatus for lighting gas by electricity, the helix of an electro-magnet connected at one end with the wire through which the current of electricity is passed, and at the other end with the circuit-breaker located at the gas-burner, so arranged that the current of electricity is passed to the circuit-breaker through said magnet, attracting an armature-actuating mechanism operating automatically to turn on the gas and light the same by the effects of the primary sparks made at the tip of the burner from said magnet in the circuit.

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3. The arms O Q, sector-wheel f n, pins l l^2 m m^2, wires M N, magnet E, lever H, carrying armature G, circuit-breaker J and pawl S, and the ratchet-wheel, all combined and arranged together and applied to a gas-burner for operation, substantially as and for the purposes set forth. 4. In an apparatus for lighting gas by electricity, in combination with a circuit-breaker located at the gas-burner, a lever adapted and arranged to open and close the stop-cock or valve of the burner, and carrying the circuit-breaker, substantially as herein described. 5. In an apparatus for lighting gas by electricity, the combination of a wire through which a current of electricity is passed, actuating mechanism for letting on the gas, and electro-magnet electrically connected with said wire, and armature operated by said electro-magnet, mechanism actuated by said armature, breaking the circuit at the burner tip, and producing there an electric spark or sparks for lighting the gas, the whole operating automatically. 6. In an apparatus for lighting gas by electricity, the combination of two wires through which currents of electricity are passed, actuating mechanism for both letting on and turning off the gas by substantially the same means, an electro-magnet electrically connected with said wires, an armature operated by said electro-magnet, mechanism actuated by said armature for breaking the circuit at the burner tip, and producing there the spark or sparks for lighting the gas, the whole operating automatically, substantially as described."

Prior to the invention for which patent No. 130,770 was granted, many patents had been issued for electric gas-lighting apparatus, in which the electric current generated by a battery was used for turning a gas-cock and igniting the gas, and for extinguishing the gas. Such apparatus was commonly called "automatic," to distinguish it from electric gas-lighting apparatus in which the gas-cock was turned by the hand of the operator and the electric current was used only to ignite the gas.

In regard to the state of the art at the date of the invention described in No. 130,770, and as to the nature of the invention set forth in reissue No. 9743, Professor Henry Morton, an

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expert for the defendant, testifies as follows: "The invention set forth in this patent is, as I understand it, a combination of instrumentalities, all of them old, both in structure and operation, to produce a certain new effect — namely, the turning on and simultaneous lighting of a number of street gas-lamps in succession by means of a single circuit passing successively through a single magnet in each lamp, said magnet operating a break-piece, which, by reason of its automatic interruptions, both produces sparks to ignite the gas and also simultaneously opens the stop-cock so as to turn on the gas, and then, in conjunction with other mechanism, shuts off the current so as to arrest further movement when the gas is fully turned on and passes on the current to the next lamp of the series. This invention further involves an arrangement by which, by the use of another circuit, the gas can be turned off successively in the several lamps by the aid of the same magnet, break-piece and the other instrumentalities which were employed to turn it on. Operating a series of street gas-lamps in succession, so as to turn the gas on and off by the use of one main conductor for such operation, and employing only one magnet for both operations in each lamp, was old, being fully set forth in patent No. 90,629, June 1, 1869, granted to Edwin E. Bean, but in this case there was no automatic interrupter for producing sparks at the lamps, but the interruptions were produced at the lighting station. In this Bean patent, however, the means employed for turning the gas on and off and shifting the circuits from lamp to lamp are substantially the same as in the patent No. 9743.

"Patent No. 101,491, dated April 5, 1870, to Morris and Reid, shows the shutting off or turning on of the gas by the direct action of electro-magnets at the several burners, and the shutting off of the current when it has done its work in each burner to the next in the series; but in this patent there is no automatic interrupter at the burner-tip connected with either of the gas-controlling circuits, two of which are used with separate magnets — one for turning on and the other for shutting off the gas. An automatic interrupter is used in this case for producing sparks to light the gas, but this is connected

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with a third electro-magnet, which is arranged in a third main circuit.

"Again, patent No. 121,301, dated November 28, 1871, granted to J. P. Tirrell, shows a single magnet with automatic break-piece, actuating, by means of a pawl and ratchet-wheel, the apparatus for turning the gas on or off and for shifting the circuit to the next lamp of the series, as in patent No. 9743. In this case, however, the gas is ignited by a spark obtained from a helix, used as a primary induction coil, located at the burner, whose break-piece, however, is operated by the magnet which turns on the gas.

"Again, in patent No. 121,302, dated November 28, 1871, granted to J. P. Tirrell, the operations of turning on and turning off and shunting to the next lamp in series are accomplished by the use of two electro-magnets, while the ignition is effected by a separate helix, exactly as in the patent last referred to.

"It thus appears that at the date of patent No. 9743 and of its original issue, 130,770, August 20, 1872, it was old to use an electro-magnet connected at one end with a wire through which the current of electricity is passed, and at the other end with a circuit-breaker located at the gas-burner, and so arranged that said circuit-breaker, acting upon and with said magnet, operates a mechanism for turning on or off the gas and shifting the circuit to the next lamp in series, and at the same time connecting the said electro-magnet and circuit-breaker with another wire, through which a current of electricity may be passed to reverse the previous operation of turning on or off when it is desired so to do. It was also old to cause the interruption producing the spark which ignited the gas, by means of the magnet which turned the gas on."

He adds, in regard to No. 130,770, and No. 9743: "The apparatus shown for carrying out the invention consists of a single magnet provided with an armature, which armature operates a pawl, which in turn operates a ratchet-wheel, connected with which ratchet-wheel are a gas-cock, and two circuit-shifting cam-wheels, whereby the circuit changes, referred to as the novelty of the invention, are occasioned through ap-

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propriate switches. The vibration of the armature is caused by the vibrating point located at the burner tip. The operation of the apparatus is that, as soon as the current of electricity is thrown through the single controlling magnet, in the operation of lighting the gas, the armature is put into vibration by reason of the automatic circuit-breaker located at the burner-tip. The first movement of the armature occasions a spark at the burner-tip, and the same electricity which does the work of operating the armature flows in its circuit through the circuit-breaker at the burner-tip, whereby the vibrations of the armature for turning on the gas and the sparks at the burner for lighting it are simultaneously produced. It is obvious that this operation would continue indefinitely, and the gas would be turned off and on successively in the operation, were it not for the circuit-breaking cams. When the gas has been turned on to its full extent, the circuit-breaking cams come into operation, and the circuit through the magnet of the burner is interrupted, and the circuit is sent into the next lighting apparatus. The result of this is twofold. In the first place, the apparatus is automatically arrested when the gas is fully turned on; and, in the second place, the current is transmitted to the next apparatus for the purpose of igniting the same. By this ingenious contrivance, a battery sufficient to light one gas-burner only can be employed to light a great number on a single line, because it is only employed to do its work on the magnet of one gas-burner at a time. Then that magnet and its accompanying operative parts are thrown out of circuit and the current is devoted to operating the next apparatus. In order, however, that this combination should be operative for the purpose set forth, it is necessary that the vibrating armature and interrupter should be used in connection with the other agencies described in patent No. 9743, such as the pawl and ratchet-wheel, and the cam-wheels and levers for shifting the circuit at the proper time. Thus, without the pawl or ratchet-wheel or some equivalent, the vibratory movement of the break-piece or interrupter could not be utilized to turn the gas on and off when required, and without the cam-wheels, levers, etc., controlling the circuits, the turning-on-

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and-off device would be useless, because it would not be under control, but would go on turning the gas on and off in rapid succession, and leave it either on or off, as chance might determine, when the current was cut off at the lighting station. In my opinion, therefore, this invention consists in a combination of agencies, all of which are necessary to render it operative. These instrumentalities are the two conducting circuits M and N, the electro-magnet F, the vibrating interrupter H with its contact point *a* at the burner-tip, the pawl S, the ratchet-wheel R attached to the valve or stop-cock, and also to the sector-wheels or cams *n* and *f*, and lastly, the levers O and Q operating the shifting of circuit from M or N to the magnet F or the next lamp, as the case may be."

There is also in the record a patent, No. 18,945, granted December 22, 1857, to Samuel Gardiner, Jr., for a mode of lighting gas by electricity, in which it is said: "I do not claim to be the discoverer of the fact that illuminating-gas may be ignited by means of electricity; nor do I claim to be the first to suggest the lighting of a street of gas-lamps simultaneously by means of electricity. A method of doing this is described on page 125 of the American Year-Book of Facts, 1851, and alleged to be the invention of M. Villatte."

Before the date of patent No. 130,770, numerous patents had been granted by the United States for electric gas-lighting apparatus; and the state of the art was such that no room was left for a pioneer or foundation patent for automatic electric gas-lighting apparatus. There are two classes of such apparatus. One of them employs a step-by-step motion, in which, by successive electric impulses, the gas-cock is rotated and always in the same direction, both for turning on and for turning off the gas. In such apparatus, there are used a single electro-magnet, a ratchet-wheel and pawl, a gas-cock which rotates always in the same direction and switching mechanism. The use of such switching mechanism is automatically to divert the electric current to the next burner, and it is absolutely necessary, for without it the gas-cock would continue to rotate, turning the gas alternately on and off, and it would be impossible for the operator to stop the movement of the gas-cock at the desired

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point. Apparatus of this class is adapted and intended to light a series of burners. In apparatus of the second class, there is only a single electric impulse, and a rocking-gas valve is turned in one direction to let on the gas and in the reverse direction to extinguish it. There are two electro-magnets, but no ratchet-wheel or pawl, and no gas-cock rotating always in the same direction, and no switching mechanism or equivalent therefor, because the apparatus is adapted and intended to light only one burner and not a series of burners. The alleged infringing apparatus of the defendant belongs to this second class.

The first experience of Tirrell with electric gas-lighting apparatus was in 1869, when he was employed by Bean to make a model of the apparatus for which the patent No. 90,629, of June 1, 1869, before mentioned, was granted to Bean; and in the year 1870, he assisted in constructing some electric gas-lighting burners which were applied to street lamps in Boston, near Boston Common. The following patents have been granted to Tirrell for inventions connected with automatic electric gas-lighting apparatus: Nos. 121,301 and 121,302, November 28, 1871; No. 130,770, August 20, 1872; No. 184,807, November 28, 1876; No. 206,057, July 16, 1878; and Nos. 230,589 and 230,590, July 27, 1880.

When the inventions were made for which the two patents of November 28, 1871, and the two patents of July 27, 1880, were granted, Tirrell was in the employ of George F. Pinkham, to whom, as his assignee, the four patents were granted. Pinkham afterward assigned those four patents, for New England, to the defendant. Dr. William C. Cutler, a witness for the plaintiff, testifies that in 1872 patent No. 130,770 was sold to the United States Gas-Lighting Company, which company, in 1879, was succeeded in business and in the ownership of the patent by the Franklin Electric Gas-Lighting Company, and that the latter company ceased to do business in 1881. In each of the two patents, Nos. 121,301 and 121,302, granted to Tirrell, November 28, 1871, there is a circuit-breaker located at the auxiliary burner and operated automatically. There would be no invention in locating the circuit-breaker at the main burner and operating it there automatically. It appears

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from those two patents that Tirrell then recognized the state of the art to be such that invention in automatic electric gas-lighting apparatus was limited to the specific mechanism described and claimed, or to its known equivalent. No. 121,302 points out the well-founded objections to the ratchet-wheel apparatus. No. 130,770 shows a ratchet-wheel apparatus containing a single electro-magnet, and dispenses with the auxiliary burner and locates the circuit-breaker at the main burner. The specification of patent No. 184,807, granted to Tirrell, November 28, 1876, states that the invention of that patent relates more particularly to the electrical gas-lighting apparatus described in patent No. 130,770, of August 20, 1872, and consists "in certain improvements in the construction, combination and arrangement of the parts embraced in said apparatus." It is also evident, from the specification and drawings of patent No. 206,057, granted to Tirrell, July 16, 1878, that that patent is for a further improvement in the construction, connection and arrangement of the several parts of the apparatus described in patent No. 130,770.

Patent No. 230,589, granted to Pinkham, as assignee of Tirrell, July 27, 1880, is for a ratchet-wheel apparatus containing a single electro-magnet and switching mechanism, and in which the gas-cock, rotating always in one direction, is opened and closed by a step-by-step motion and by successive electric impulses; and the specification states that the invention "relates to that class of apparatus in which two separate wires are employed, one for letting on and lighting, and the other for shutting off the gas." Patent No. 230,590, granted to Pinkham, as assignee of Tirrell, July 27, 1880, is for an apparatus having two electro-magnets, which does not contain a ratchet-wheel or switch mechanism, and in which the gas-cock is opened and closed, as may be desired, by a single electric impulse. In that apparatus, sparks are produced at the burner-tip, after the gas-cock has been opened, so long as the operator keeps the electric circuit closed, and without further movement of the gas-cock. The lighting of the gas is insured by the production of a succession of sparks at the burner-tip, after the gas-cock has been fully opened. Burners

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embodying the invention of patent No. 230,590 were the first ones which operated successfully in practical use; and that patent was held valid by Judge Colt, in *Boston Electric Co.* v. *Fuller*, 29 Fed. Rep. 515. All of the earlier automatic apparatuses were adapted and intended to light street lamps or a series of burners, while the apparatus of No. 230,590 was not adapted to light a series of burners, but was designed for house lighting, where it is required that each burner be capable of being lighted or extinguished independently of any other burner.

Very shortly after Tirrell made and sold to Pinkham the inventions described in patents Nos. 230,589 and 230,590, granted July 27, 1880, and the applications for which were filed May 22, 1880, and after the apparatus of No. 230,590 had been put into successful use by the defendant and by other persons who had acquired the right to use the invention from Pinkham, Tirrell was induced by the Franklin Electric Gas-Lighting Company to apply, in February, 1881, for the reissue of No. 130,770. Patents No. 121,301, 121,302, 230,589, and 230,590 were then owned by the defendant, for New England. The record does not disclose who then owned the other two Tirrell patents, Nos. 184,807 and 206,057, for improvements in the apparatus of No. 130,770. No. 184,807 was applied for January 14, 1876, nearly three years and five months after No. 130,770 had been granted; and the second paragraph of the specification of No. 184,807 says: "This invention relates more particularly to the electrical gas-lighting apparatus embraced and described in the schedule annexed to the letters patent of the United States issued to me, dated August 20, 1872, numbered 130,770; and it consists in certain improvements in the construction, combination and arrangement of the parts embraced in said apparatus, all as hereinafter fully described." Tirrell's attention was again specially called to the apparatus of patent No. 130,770, when he applied, October 18, 1877, for patent No. 206,057; yet it did not occur to him or to any one else until February, 1881, that No. 130,770 did not claim all that he had invented. Apparatus like that shown in the drawings of No. 130,770 had not operated suc-

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cessfully, and had not been manufactured for several years prior to 1881. The apparatus of No. 184,807 had not been used to any extent.

Although the Franklin Electric Gas-Lighting Company obtained title to No. 130,770 from the United States Gas-Lighting Company in 1878 or 1879, and Dr. Cutler was an officer and stockholder of both of those companies during their existence, and had been a stockholder in the plaintiff company, yet the Franklin Electric Gas-Lighting Company, which ceased to do business in 1881, never put into use any automatic electric gas-lighting apparatus after the apparatus described in No. 230,590 had been invented. Dr. Cutler, in his testimony, on being asked to state if he knew with what purpose and intention application was caused by the Franklin Electric Gas-Lighting Company to be made for a reissue of No. 130,770, replied: "For the reason that we were told that we had no claim for the invention of the turning of the stop-cock and lighting the gas by a single current with one wire, in our 1872 patent, and for no other reason." The assent of the Franklin Electric Gas-Lighting Company to the application for the reissue was signed in its behalf by Dr. Cutler as its president.

The only motive which the officers of that company had in inducing Tirrell to apply for a reissue of No. 130,770, was to expand its claims so as to cover the invention for which No. 230,590 had been granted. The file-wrapper and contents in the matter of the reissue form part of the record. In the oath to the application, Tirrell states that the patent is inoperative by reason of a defective specification, "and that such defect consists in the omission of claims for the different combinations of wires, electro-magnets, armature attracted thereby, mechanism actuated by said armature, circuit-breaker, and other elements operating automatically as specified and claimed in the claims of this application." When the application for the reissue was first filed, it contained the following eleven claims: "1st. In an apparatus for lighting gas by electricity, a wire through which a current of electricity is passed, having electrical connection with an electro-magnet

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attracting an armature, which armature actuates mechanism operating automatically to turn on the gas and light the same by an electric spark or sparks at the tip of the gas-burner. 2d. In an apparatus for lighting gas by electricity, a wire through which a current of electricity is passed, having electrical connections with an electro-magnet attracting an armature, which armature actuates mechanism operating automatically to turn off the gas and extinguish the light. 3d. In an apparatus for lighting gas by electricity, two wires through which currents of electricity are passed, each wire electrically connected with the same electro-magnet, attracting an armature, which armature actuates mechanism operating automatically to turn on the gas and light the same by an electric spark or sparks at the tip of the gas-burner, and also to turn off the gas and extinguish the light. 4th. In an apparatus for lighting gas by electricity, two wires through which currents of electricity are passed, which wires are electrically connected with an electro-magnet, attracting an armature, which armature actuates mechanism operating automatically to turn on the gas and light the same by an electric spark or sparks at the tip of the gas-burner, and also to turn off the gas and extinguish the light. 5th. In apparatus for lighting gas by electricity, a circuit-breaker located at the burner and operated automatically, substantially as described. 6th. In an apparatus for lighting gas by electricity, the helix of an electro-magnet connected at one end with the wire through which the current of electricity is passed, and at the other end with a circuit-breaker located at the gas-burner, so arranged that the current of electricity is passed to the circuit-breaker through said magnet, attracting an armature-actuating mechanism, operating automatically to turn on the gas and light the same by the effects of the primary sparks made at the tip of the burner from said magnet in the circuit. 7th. The arms O Q, sector-wheels f n, pins l l^2, m m^2, wires M^m N^n, magnet E, lever H, carrying armature G, circuit-breaker J, and pawl S, and the ratchet-wheel, all combined and arranged together and applied to a gas-burner for operation, substantially as and for the purposes set forth. 8th. In an apparatus

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for lighting gas by electricity in combination with a circuit-breaker located at the gas-burner, a lever adapted and arranged to open and close the stop-cock or valve of the burner and carrying the circuit-breaker, substantially as herein described. 9th. In an apparatus for lighting gas by electricity, the combination of a wire, through which a current of electricity is passed, actuating mechanism for letting on the gas, an electro-magnet electrically connected with said wire, an armature operated by said electro-magnet, mechanism actuated by said armature, breaking the circuit at the burner-tip and producing there an electric spark or sparks, from the effects of the electro-magnet, for lighting gas, the whole operating automatically. 10th. In an apparatus for lighting gas by electricity, the combination of two wires through which currents of electricity are passed, actuating mechanism for both letting on and turning off the gas by substantially the same means, an electro-magnet electrically connected with said wires, an armature operated by said electro-magnet, mechanism actuated by said armature for breaking the circuit at the burner-tip and producing there the primary or electric spark or sparks for lighting the gas, mechanism actuated by said armature for turning off the gas, the whole operated automatically. 11th. In an apparatus for lighting gas by electricity, a series of electro-magnets connected with a series of gas-burners, so arranged that when a current of electricity is passed through a wire-actuating mechanism for letting on the gas of the first burner to an electro-magnet connected therewith, said magnet operates an armature-actuating mechanism operating automatically to turn on the gas of the first burner and light the same by an electric spark or sparks at the tip of the burner, and also to cut off the current of electricity from the first electro-magnet and throw the same into the wire-actuating mechanism for letting on the gas of the next burner."

In these eleven claims, claims 5, 8 and 7 are substantially the same, respectively, as claims 1, 2 and 3 of the original patent. The other eight claims consequently must have been intended to embrace some invention not covered by the three claims of the original patent; and it is apparent that the sole

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purpose of the reissue was to add claims which would cover all electric gas-lighting apparatus in which one electric circuit was made use of for turning the gas-cock and igniting the gas; and it was not until after Tirrell's apparatus of 1880 had been put into public use that the discovery was made that the claims of patent No. 130,770 did not cover his invention.

Under date of March 8, 1881, the examiner rejected claims 1, 2, 3, 4, 5, 10 and 11 of the foregoing, stating that they were met by Tirrell's patent No. 121,301, of November 28, 1871. Thereupon, Tirrell erased claims 1, 2, 3, 4, 10 and 11, and inserted a new claim, which was finally allowed as claim 6 of the reissue, and also the following claim: "1. In an apparatus for lighting gas by electricity, the combination of two wires through which currents of electricity are passed, an electro-magnet or magnets electrically connected therewith, an armature or armatures attracted by said magnet or magnets, and mechanism actuated by said armature or armatures and operating automatically, whereby the gas is turned on and lighted by an electric spark or sparks at the tip of the gas-burner, and the gas also turned off and the light extinguished, substantially as described."

In their communication to the Patent Office, dated March 30, 1881, covering those amendments, his attorneys said: "A reconsideration of claim 2, formerly claim 5, is respectfully requested, as it is almost identically the same as claim 1 of the original patent. In the former patent of applicant's, cited as a reference by the examiner, the gas is first lighted at an auxiliary burner, whose flame ignites the gas at the illuminating burner. In the present application, the circuit-breaker is located directly at the illuminating burner, no auxiliary burner being used. It is believed that the claims as now presented do not conflict with the reference, and a favorable action on the case is, therefore, respectfully requested."

It is plain that no invention was required in locating the circuit-breaker at the main burner, the apparatus operating in the same way as before, and the auxiliary burner having been used only for the purpose of securing the supposed advantage set forth in patent No. 121,301.

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In reply, the examiner wrote to Tirrell, under date of April 5, 1881, as follows: "This case has been again examined. There being but a single magnet and a single armature shown, applicant cannot pluralize these terms, as he has done in his amended first claim. The 1st and 7th claims inserted by amendment March 27 [30], as well as the third (original sixth) claim, are met by Edward E. Bean, 90,629, June 1, 1869 (gas-lighting). The 2d (original fifth) claim is met by Morris and Reid, 101,491, April 5, 1870 (gas-lighting)."

On April 29, 1881, Tirrell amended his application by erasing claims 1 and 2, by inserting a claim which is claim 1 in the reissue as granted, and by inserting the following claim: "2. In an apparatus for lighting gas by electricity, a circuit-breaker located at the top of the burner and operated automatically by means substantially as described."

In reply, the examiner wrote, under date of April 30, 1881: "This case has received further attention. The present second claim is substantially the same as the original 5th, and is met by Morris and Reid, 101,491, April 5, 1870 (gas-lighting)."

Thereupon Tirrell erased claim 2, by a communication in which his attorney said: "The application having been amended in conformity with the requirements of the office, and being a reissue application, an immediate allowance is respectfully requested."

By thus erasing this claim 2, which was substantially the same as claim 5 of the original application for the reissue, such erasure being made on the objection of the Patent Office, Tirrell effectually conceded that the first claim of the original patent was invalid. Furthermore, by erasing claim 1, which he had inserted by his amendment of March 30, 1881, on the objection of the Patent Office that the apparatus of the original patent showed but a single magnet and a single armature, Tirrell conceded that he was not entitled to a claim for an apparatus in which two magnets or two armatures were used; and the claims of the reissue must be held to be limited to the specific mechanism claimed in the original patent. *Sutter* v. *Robinson*, 119 U. S. 530, 541.

In the present case, the original patent was not inoperative

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or invalid by reason of a defective or insufficient description of the invention, for the text of the specification of the reissue, aside from the claims, is substantially the same as that of the original. Nor was the application for the reissue made because Tirrell in the original had claimed as his invention more than he had a right to claim as new, for his oath declares that the defect consists in the "omission of claims." The object of the reissue was to prevent the patent from being confined to the apparatus illustrated in the drawings and described in the specification of the original, and to enable it to cover apparatus covered by patents issued subsequently to the original, and especially apparatus covered by patent No. 230,590. The new claims of the reissue are not for the same invention set forth in the claims of the original.

It is now contended that the invention which Tirrell really made, and which he intended to secure by patent No. 130,770, was the utilizing of one electric circuit both to turn on and to light the gas; but in the description contained in the specification of the original patent, there was no statement that the invention consisted in utilizing one electric circuit to do the work of turning on and lighting the gas, which formerly had required two electric circuits, nor was there any claim for such an invention. The statement in the second paragraph of the specification, that "under this invention the circuit-breaker is located at the burner, and by the direct action of the current, through the magnet located at the burner, the circuit-breaker and the valve to let on or turn off the gas are both operated," is equally true of the apparatus shown in patent No. 121,301, granted to Tirrell, November 28, 1871, except that in the latter patent the circuit-breaker is located at the auxiliary burner instead of at the main burner. The invention which Tirrell really made is what he claimed in No. 130,770. What he described in the specification of that patent and did not claim is presumed to have been old.

Moreover, the unexplained delay in applying for the reissue must be regarded as fatal to its claims. *Miller* v. *Brass Co.*, 104 U. S. 350, 355; *Clements* v. *Odorless Apparatus Co.*, 109 U. S. 641, 649; *Mahn* v. *Harwood*, 112 U. S. 354, 363; *Wollen-*

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sak v. *Reiher*, 115 U. S. 96, 100; *Ives* v. *Sargent*, 119 U. S. 652, 662; *Hoskin* v. *Fisher*, 125 U. S. 217.

Nor was there any inadvertence, accident or mistake such as would authorize a reissue with new claims. *Clements* v. *Odorless Apparatus Co.*, 109 U. S. 641, 649; *Mahn* v. *Harwood*, 112 U. S. 354, 359; *Coon* v. *Wilson*, 113 U. S. 268, 277; *Newton* v. *Furst & Bradley Co.*, 119 U. S. 373, 385; *Worden* v. *Searls*, 121 U. S. 14, 24; *Matthews* v. *Ironclad Mfg. Co.*, 124 U. S. 347.

Claim 1 of the original patent cannot be regarded as a proper foundation for claims 2 and 5 of the reissue, because that claim was repeated in the application for the reissue, and was abandoned by Tirrell after he had repeatedly attempted, and unsuccessfully, to convince the Patent Office that the invention set forth in that claim was not anticipated by the patents referred to by the office. Nor can it be held that claims 2 and 5 of the reissue are for inventions which the specification of the original set forth as the inventions of the patentee.

Unless the first claim of the original is to be limited to a circuit-breaker located at the burner, the fourth claim of the reissue claims a combination of a smaller number of elements than claim 2 of the original, and is therefore void.

A suit was brought by the present plaintiff, in the Circuit Court of the United States for the Southern District of New York, against Luther G. Tillotson and another, composing the firm of Tillotson & Co., for an infringement of reissue No. 9743, and was heard before Judge Wheeler, whose opinion is reported in 21 Fed. Rep. 568. The infringing apparatus was made under patent No. 230,590. The question of the validity of the reissue was considered by the court, in reference to claims 2 and 5, and it was held that those claims were invalid, on the ground that they were not made anywhere in the original patent as a part of the invention; that that patent had stood nearly nine years before those claims were made; and that the right under which the defendant operated had accrued before they were made. The same result was reached by Judge Wheeler in a suit in the same court, as to claim 5 of the reissue, against Smith and Rhodes, 23 Fed. Rep. 195. In the

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present case, Judge Colt, in his opinion in 29 Fed. Rep. 455, adopted the views of Judge Wheeler as to claims 2 and 5 of the reissue, and held those claims to be void, under the authority of *Miller* v. *Brass Co.*, 104 U. S. 350, and subsequent cases. In regard to claim 4 of the reissue, which is in substance the same as claim 2 of the original, Judge Colt held that there was no infringement, because there was in the defendant's apparatus no separate lever to open and close the valve and carrying the circuit-breaker, such as is described in the Tirrell patent.

The defendant's apparatus is the Crockett burner, described in patent No. 281,345, of July 17, 1883, and resembles the apparatus of patent No. 230,590 in dispensing with the ratchet-wheel and switching mechanism, in opening and closing the gas-cock with one electric impulse, and in employing two electro-magnets and two independent electric circuits, one for turning on and igniting the gas, and the other for turning off the gas.

If the claims of the reissue are limited, as they must be, to the specific mechanism described in the specification, it is very clear that the defendant's apparatus does not infringe. It is incapable of being used to light a series of burners. It opens the gas-valve by a single impulse, and closes it by a single impulse. No spark is produced until the gas-valve is fully opened. It has no switching mechanism, or any equivalent therefor, no ratchet-wheel and pawl, and no lever carrying the circuit-breaker. It has two magnets, two armatures, and two electric circuits, the magnets having no connection with each other, one of them being used solely for turning on and lighting the gas, and the other for turning it off, and no spark being produced in the latter operation. Nor has it any lever distinct from the armature; nor is the armature which operates to close the gas-valve ever in combination with the circuit-breaker. *Decree affirmed.*

ELECTRIC GAS-LIGHTING COMPANY *v.* TILLOTSON. Appeal from the Circuit Court of the United States for the Southern District of New York. No. 235. Argued March 20, 1891. Decided April 6,

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1891. MR. JUSTICE BLATCHFORD delivered the opinion of the court. This suit is founded upon the same reissue, No. 9743, considered in No. 232, *Electric Gas-Lighting Co.* v. *Boston Electric Co.*, just decided. The case was heard by Judge Wheeler, who dismissed the bill, holding that claims 2 and 5 of the reissue were invalid. 21 Fed. Rep. 568. It having been stipulated that, if the decree in No. 232 is affirmed, the decree in No. 235 shall be affirmed without costs to the appellee, and the decree in No. 232 having been affirmed, the decree in No. 235 is

Affirmed, without costs to the appellee.

Mr. Edward P. Payson and *Mr. Edwin H. Brown* for appellant.

Mr. John E. Abbott and *Mr. John L. S. Roberts* for appellee.

In re MANNING, Petitioner.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 1607. Submitted March 17, 1891. — Decided April 6, 1891.

A person is not denied the equal protection of the laws, nor deprived of liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution, by being tried and sentenced to imprisonment by a judge who, although appointed by the governor without authority, is a judge *de facto* of a court *de jure*, by the law of the State as declared by its highest court.

THE case is stated in the opinion.

Mr. Rublee A. Cole and *Mr. W. W. O'Keefe* for petitioner.

No one opposing.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a writ of error to review a judgment of the Supreme Court of the State of Wisconsin, denying to Patrick Manning a writ of *habeas corpus* to discharge him from the

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custody of the warden of the state prison under a sentence of the municipal court for Ashland County. 76 Wisconsin, 365. The case was this:

By the statute of Wisconsin of 1889, c. 94, § 1, "A municipal court for the city and county of Ashland is hereby established, under the name of the municipal court for Ashland County," which "shall be a court of record, have a clerk and a seal," and "may exercise powers and jurisdiction equal to, and concurrent with, the Circuit Court of Ashland County, in all cases of crimes and misdemeanors arising in said county, except murder and rape," besides other jurisdiction, criminal and civil.

By § 4, "The qualified voters of the county of Ashland shall, on the first Tuesday in April, 1889, and on the first Tuesday of April every fourth year thereafter, elect a suitable person to the office of judge of said municipal court, to be called municipal judge, who shall hold his office for the term of four years from the first Monday in January next succeeding his election, and until his successor shall be elected and qualified." "Whenever a vacancy shall happen in the office of said judge, the governor shall fill such vacancy by appointment. The person so appointed shall hold the office until his successor shall be elected and qualified."

By § 11, "This act shall take effect and be in force from and after its passage and publication." It was approved by the governor March 14, and published March 15, 1889.

The first election of judge of the municipal court for Ashland County was held on April 2, 1889, when L. A. Calkins was elected for the term of four years beginning the first Monday of January, 1890; and on April 4, 1889, the governor appointed him judge of that court "for the term ending the first Monday of January, 1890."

In that court, held by said Calkins as judge, the petitioner was in August, 1889, charged with manslaughter, tried and convicted in October, and sentenced on November 9, 1889, to imprisonment at hard labor in the state prison for three years, and was held by the warden under that sentence.

It was contended in his behalf that, at the time of his trial

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and sentence, there was no such court in existence as the municipal court for Ashland County; that the governor had no authority to appoint a judge of that court before the first Monday of January, 1890; that before that date there was no judge, *de jure* or *de facto*, of that court; that the court which tried and sentenced him had no jurisdiction; and that he had been denied the equal protection of the laws, and deprived of his liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Wisconsin, as appears by its opinion delivered in a similar case decided at the same time, and referred to in its opinion in this case, denied the writ of *habeas corpus* because, assuming that the governor had no authority to make, when he did, the appointment of Calkins as judge of the municipal court for Ashland County, yet that court was established and in legal existence from and after the publication of the statute of 1889, c. 94, on March 15, 1889, and by the law of Wisconsin, as declared in a long series of decisions, it was a settled rule that "if the office has been lawfully established, and a person exercises the functions thereof by color of right, but whose election or appointment thereto is illegal, his official acts therein cannot be successfully attacked in collateral proceedings, but in all such proceedings will be valid and binding until the officer is ousted by the judgment of a court in a direct proceeding to try his title to the office;" and that Calkins, at the time of the proceedings against the petitioner, was, "at least, judge *de facto* of such court." *In re Burke*, 76 Wisconsin, 357, 363.

The cases cited fully support that position. See especially *In re Boyle*, 9 Wisconsin, 264; *Dean* v. *Gleason*, 16 Wisconsin, 1; *Chicago & Northwestern Railway* v. *Langdale County*, 56 Wisconsin, 614; *Yorty* v. *Paine*, 62 Wisconsin, 154.

It must, therefore, be taken as conclusively settled that by the law of Wisconsin, at the time of the trial and sentence of the petitioner, the court in which he was tried and sentenced was a court *de jure*, and the judge who tried and sentenced him was at least judge *de facto*, and the sentence itself was

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valid; and there is no ground on which this court can hold that sentence, or the imprisonment under it, to be a violation of the Constitution of the United States. *Norton* v. *Shelby County*, 118 U. S. 425; *In re Graham*, 138 U. S. 461; *In re Duncan, Petitioner*, 139 U. S. 449.

Judgment affirmed.

DAVIS'S ADMINISTRATOR v. WEIBBOLD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 219. Submitted March 3, 1891. — Decided April 6, 1891.

The provisions of the public town-site laws prohibiting acquisition of title thereunder to mines of the precious metals, and protecting therefrom possessory claims under the mining laws, must be construed in accord with the uniform exception in Federal legislation of mineral lands from grant or sale, and held merely to prohibit passage of title thereunder to mines of gold, silver, cinnabar or copper which are known to exist on the issue of the town-site patent, and to mining claims and possessions then lawfully existing. Such exceptions include only those lands which at the date of the grant are of known sufficient mineral value and extent to justify expenditures for the extraction of the mineral.

Town-site patent of earlier date covering same premises embraced in junior mining patent carries the title in absence of proof establishing the known existence of the mine at date of such town-site patent. The claimant under the town-site patent may offer evidence to prove that the premises were not known to be valuable for minerals at date thereof to rebut the presumption *contra* indulged, without proof, solely from the fact of issue of such mineral patent.

Exception from the mineral patent of town-site occupancy and improvements, within recited limitations, is unimportant. A mineral patent carries with it all rights which the law confers, and officers of the Land Department cannot enlarge or diminish those rights by any reservation beyond or differing from those contained in the law.

The mining laws provide for exploration and purchase of the mineral lands of the United States, and where prior to town-site patent proceedings thereunder to acquire title are initiated, the same may be prosecuted to completion afterwards. But in absence thereof, on issue of town-site patent and conveyance to individuals thereunder, the premises become private property, and jurisdiction to grant patents of them under the

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mining laws no longer exists. While the patent of the government is exempt from collateral attack in actions at law, such exemption obtains only where jurisdiction of the Land Department over the land, and power to determine the facts necessary to such issue, exist.

THE case, as stated by the court, was as follows:

This is an action for the possession of a parcel of mining land in Silver Bow County, formerly Deer Lodge County, of the Territory, now State, of Montana. It is designated in the complaint as a quartz lode, known as the Gold Hill lode mining claim, in the Summit Valley mining district in that county, and is described by metes and bounds. It is alleged to contain seven acres and a fraction of an acre of land, and to embrace 1460 linear feet of the Gold Hill lode. The complaint avers that in January, 1881, the plaintiff was the owner and entitled to the possession of the property; that afterwards, in June, 1881, while he was still owner and entitled to its possession, the defendants wrongfully and unlawfully entered thereon and withhold the same from him, to his damage of $5000; and that its rents and profits during that time amount to $10,000. The plaintiff therefore prays to be adjudged its owner and to be entitled to its possession, and for his damages in the sum of $15,000.

One of the defendants, Andrew J. Davis, the appellant here, appeared to the action and filed a separate answer to the complaint, denying the ownership by the plaintiff, or his right to the possession of portions of the quartz lode mining claim described in the complaint, which portions are designated as certain lots in block thirteen, in Butte City, Silver Bow County, according to the official survey of the town site in the recorder's office of the county; and as to the residue of the premises, described in the complaint, disclaiming any right or interest therein. He further denied that he ever entered upon the lots described without right or title and ejected the plaintiff therefrom, and also the alleged value of the rents and profits since such supposed entry.

Davis, as a separate defence, also set up, in bar of the action, the statute of limitations of Montana, and that he and those

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under whom he derived his interest had been in possession of the lots described more than five years, under a claim of title founded upon a written conveyance thereof, exclusive of any other right.

It is not disclosed by the record that any other of the defendants appeared in the action. To the answer filed the plaintiff replied traversing the averments of the separate defence.

On the trial, which followed, the plaintiff relied upon the patent of the United States for the mining claim described in the complaint, issued to him, bearing date January 15, 1880. It recites that in pursuance of the provisions of the Revised Statutes of the United States — chapter 6, Title 32 — there had been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of Heinrich C. Wiebbold (the plaintiff herein) upon the Gold Hill lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appeared that in pursuance of the Revised Statutes, Wiebbold did, on the 19th of September, 1878, enter and pay for said mining claim or premises, being mineral entry No. 438, in the series of said office, designated by the surveyor-general as lot No. 65, in the district of lands subject to sale at Helena, containing seven acres and sixty-hundredths of an acre of land, more or less; and which is fully described by metes and bounds.

The following is the granting clause of the patent, with the conditions and stipulations annexed:

"Now, know ye, that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Heinrich C. Wiebbold and to his heirs and assigns the said mining premises hereinbefore described as lot No. 65, embracing a portion of township three (3), north of range eight (8), west of the principal meridian, *with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents*

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and of fourteen hundred and sixty (1460) linear feet in the said Gold Hill vein, lode, ledge or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining, and also all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: *Provided*, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits, *excepting and excluding, however, from these presents all town property rights upon the surface, and there are expressly excepted and excluded from the same all houses, buildings, structures, lots, blocks, streets, alleys or other municipal improvements on the surface of the above-described premises not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession and enjoyment of the same: And provided further*, That nothing in this conveyance shall authorize the grantee herein, his heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto said Heinrich C. Wiebbold and to his heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations.

'First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 65, with fourteen hundred and sixty (1460) linear feet of the Gold Hill, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

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Statement of the Case.

"Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

"Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

"Fourth. That in the absence of necessary legislation by Congress the legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

"In testimony whereof, I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

"Given under my hand, at the city of Washington, the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty, and of the independence of the United States the one hundred and fourth.

"By the President: R. B. Hayes,

"By Wm. H. Cook, *Secretary.*

"S. W. Clark, *Recorder of Gen. Land Office.*"

To the introduction of this patent the defendant objected, on the ground that the exception contained in it excluded all town lots from the grant, and that it was necessary for the plaintiff to show that the property in controversy did not consist of lots thus excepted. But the court overruled the objection, and allowed the patent to be introduced; and to the ruling the defendant excepted.

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The defendant, to maintain the issue on his part, introduced a patent of the United States, bearing date September 26, 1877, issued to Orville B. O'Bannon, probate judge of Deer Lodge County, Montana Territory, in trust for the use and benefit of the occupants of the town site of Butte, in that county. It recites that the probate judge, by virtue of the act of Congress of March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," had deposited in the General Land Office of the United States a certificate of the register of the land office at Helena, Montana Territory, whereby it appeared that full payment had been made by the probate judge in trust as aforesaid, according to the provisions of the act of Congress of April 24, 1820, entitled "An act making further provisions for the sale of public lands;" for the tract of land constituting the town site of Butte, embracing one hundred and eighty-three acres and a fraction of an acre, and of which a full description is given by metes and bounds. The following is its granting clause:

"Now, know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Orville B. O'Bannon, probate judge as aforesaid, in trust as aforesaid, and to his successors the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Orville B. O'Bannon, probate judge as aforesaid, in trust as aforesaid, and to his successors and assigns in trust as aforesaid. *No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws of Congress.*

"In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

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"Given under my hand, at the city of Washington, the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the one hundred and second.

"[SEAL.] By the President: R. B. HAYES,

"By B. LANG, *Secretary.*

"S. W. CLARK, *Recorder of General Land Office.*"

The defendant also introduced a deed from the probate judge to himself, dated March 24, 1877, of the lots claimed by him in his answer. This deed recites that the site of the town of Butte had been duly entered by the probate judge, pursuant to the act of Congress; that a portion of the lots in such town site were regularly preëmpted and conveyed by the probate judge to the parties entitled thereto; that there remained a portion of the town lots unclaimed after the expiration of sixty days; that in pursuance of the act of the legislature of Montana Territory relating to the preëmption of town sites and the disposal of lots therein, the probate judge had given notice more than ten days that he would sell, on a day designated, at public sale, certain of the lots remaining unclaimed; that in pursuance of the notice the property described in the deed was, on the 12th of March, 1877, offered for public sale, and no bid having been received therefor, and the property offered being thereby rendered subject to private entry, the party of the second part, the defendant herein, had filed with the probate judge an application to enter the same; and therefore, in consideration thereof, and of the sum of $220 paid, the probate judge, by virtue of the authority vested in him by the acts of Congress and the legislature of Montana, thereby remised, released and quit-claimed unto the said party of the second part the property described in his answer, with the exception of three lots, to have and to hold the premises, together with all the rights, privileges and appurtenances thereunto belonging, to himself and to his heirs and assigns, as fully as by virtue of the acts of Congress and of the legislature of Montana, and the proceedings thereunder, the said party of the first part could convey the same.

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The defendant then offered himself as a witness to prove that, for the five years preceding the commencement of the action, he had been in the exclusive possession of the premises, with the exception of three lots, as set forth in his answer, under the patent to the probate judge, and the latter's deed to him, under a claim of title exclusive of other rights, founding his claim upon those conveyances; but the plaintiff objected that the patent to the Gold Hill lode was issued June 5, 1880, and the action was commenced on the 8th day of August, 1884, showing that five years had not elapsed between the issuing of the patent and the commencement of the action, which objection the court sustained, and to the ruling an exception was taken.

The defendant also offered to prove by sundry witnesses that at the time the patent of the Butte town site to the probate judge was issued in trust for its occupants, the premises embraced by the Gold Hill lode were not known to be valuable for minerals of any kind. To this evidence objection was taken, on the ground that the patent to the plaintiff proved that the premises contained valuable minerals, and as such could not be granted by the patent for the town site, which objection the court sustained, and to the ruling an exception was taken. Evidence was also introduced by both parties as to the value of the rents and profits of the property.

No other evidence was given or offered than as above stated. The court gave judgment that the plaintiff recover possession of certain portions of the premises claimed, which portions are designated by lots in block thirteen of Butte City, and that a writ of restitution issue therefor; and also that the plaintiff recover $900 as damages for the detention of the property. On appeal to the Supreme Court of the Territory the judgment was affirmed, and to review this latter judgment the case was brought to this court by appeal, the statute providing that mode of bringing up the case for review here instead of by a writ of error. Pending this appeal the appellant died, and the case was, by order of the court, continued in the name of his special administrator, James A. Talbott.

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Mr. James W. Forbis for appellant.

Mr. S. M. Stockslager for appellee.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The record in stating the judgment below does not show any findings of fact by the court, which tried the case without the intervention of a jury. The order for the judgment necessarily implies that the facts were found by the court upon which the order was made, but, like a verdict of a jury, the findings should properly appear in the record. The omission, it is true, was not noticed by counsel in the Supreme Court of the Territory, nor has it been called to our attention. It was probably a mistake of the copyist in making the transcript, for the argument has proceeded upon the theory that such findings were made. The plaintiff assigns as one of the errors committed that the court erred "in finding for plaintiff on all of the issues presented in the pleadings." We have, therefore, passed by this omission, and permit the party who defends the ruling below to supply the defect.

In *Deffeback* v. *Hawke*, which was before us at October term, 1885, (115 U. S. 392,) we examined at some length the legislation of Congress excepting lands containing minerals from sale or other disposition under laws providing for the alienation of portions of the public domain either for settlement or in aid of public institutions or works of internal improvement. It appeared upon such examination that until the act of July 26, 1866, such exception was general, but by that act the policy of reserving mineral lands from sale or grant was changed. Such lands of the public domain, both surveyed and unsurveyed, were thereby declared to be free and open to exploration and occupation by all citizens of the United States and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law, and to the local customs or rules of miners in mining districts, so far as they were not in conflict

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with the laws of the United States. 14 Stat. c. 262, sec. 1, p. 251.

By the act of May 10, 1872, to promote the development of the mining resources of the United States, (17 Stat. p. 94, c. 152, § 9,) the first section of the act of 1866, declaring the mineral lands of the United States free and open to exploration and occupation, was repealed, and in place of it a provision was adopted declaring that "all valuable mineral deposits," in lands belonging to the United States, both surveyed and unsurveyed, were free and open to exploration and purchase, subject to conditions similar to those in the original act. The Revised Statutes, which embody the law of the United States in force on the first of December, 1873, in its treatment of mineral lands, provided that "in all cases lands valuable for minerals" should be reserved from sale, except as otherwise expressly directed by law, (§ 2318;) but at the same time repeated the declaration, that all valuable mineral deposits in lands belonging to the United States should be free and open to exploration and purchase. § 2319. After that date title to mineral lands, known at the time to be valuable, could only be acquired under provisions specially authorizing their sale, except in certain States, which exception does not affect the question now before us.

Chapter eight, Title thirty-two, of the Revised Statutes, contains the law for the reservation and sale of town sites on the public lands. Among other things it provides for the entry, at the local land office, of any portion of the public lands occupied as a town site by its corporate authorities, or, if the town be unincorporated, by the judge of the county court of the county in which the town is situated; the entry to be "in trust for the several use and benefit of the occupants thereof, according to their respective interests;" and the execution of the trust and the disposal of the lots in the town to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the town is situated. It also provides that the entry shall include only such land as is actually occupied by the town, and the title to which is in the United States; and

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declares that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof;" with the reservation, however, that nothing in the section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States. By another section of the chapter, and near its close, it is enacted that "no title shall be acquired" under its provisions "to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws." Sec. 2392.

In *Deffeback* v. *Hawke*, we said of this statement of the legislation of Congress, that it was plain that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper, could be obtained under the preëmption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands,—except in certain States, not affecting the question before us, commenting particularly upon the terms *known* and *valuable* used in connection with the minerals in public lands, implying that they must be of that character to bring the lands within the exception of mineral lands from sale or grant by the United States.

In that case there was no dispute as to the mineral character of the land claimed by the plaintiff under his mining patent, when the town site was entered by the probate judge at the local land office. Proceedings for the acquisition of the mining claim had been previously initiated, the entry of the same had been had, and payment of the price made to the government; and when the patent subsequently issued it took effect by relation at the date of the entry, that being the earliest evidence of any movement for the acquisition of the title of the government. Here the case is different; here the Butte town site had been entered at the local land office by the probate judge of the county and the patent of the United States in due form issued to him in trust for the occupants of

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the town, before the date of the mining patent, or the entry of the mining claim at the local land office. And before that time a deed had been made by the probate judge to the defendant of the premises occupied by him, to recover which the present action is brought.

When the entry of the town site was had, and the patent issued, and the sale was made to the defendant of the lots held by him, it was not known — at least it does not appear that it was known — that there were any valuable mineral lands within the town site, and the important question is whether in the absence of this knowledge the defendant can be deprived under the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer.

After much consideration we have come to the conclusion that this question must be answered in the negative. It is true the language of the Revised Statutes touching the acquisition of title to mineral lands within the limits of town sites is very broad. The declaration that "no title shall be acquired" under the provisions relating to such town sites, and the sale of lands therein "to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws," would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such is not the necessary meaning of the terms used; in strictness they import only that the provisions by which the title to the land in such town sites is transferred shall not be the means of passing a title also to mines of gold, silver, cinnabar or copper in the land, or to valid mining claims or possessions thereon. They are to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying exceptions in acts of Congress of mineral lands from grant or sale. Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the town site laws to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town-site patent. and to mining claims and mining pos-

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sessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from preëmption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term mineral in the sense of this statute is applicable.

On this subject there has been great uniformity of decision by those courts of the States and of the United States which have had the most frequent occasion to consider the subject, and by the Land Department.

In *Alford* v. *Barnum*, 45 California, 482, before the Supreme Court of California in January, 1873, the question arose as to the meaning of the term mineral lands in the acts of Congress of July 1, 1862, and July 2, 1864, excepting such lands from the grants made by Congress to aid in the construction of a railroad and telegraph line across the continent. In the act of 1862 the language is that all mineral land shall be excepted from the operation of the act. 12 Stat. p. 492, c. 120, sec. 3. In the act of 1864, amending the act of 1862, it is declared that the term mineral land, whenever it occurs in the act, and the act to which that was an amendment, shall not be construed to include coal and iron lands. 13 Stat. p. 358, c. 216, sec. 4. The action in that case was to abate a ditch as a nuisance. The complaint alleged that the plaintiff was the owner of a section of land in California, and that the defendants were digging a ditch across the same, which was to be used for mining purposes. The defendants answered that the

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land was public mineral land of the United States, and that they were mining thereon for gold. The plaintiff at the time was in possession of the land under a contract of purchase from the railroad company, which had a patent from the United States under the acts of 1862 and 1864, and it was contended that the land was mineral land, excepted both by the acts of Congress and by the patent, which contained similar provisions. The plaintiff having recovered in the court below, the case was taken to the Supreme Court, where the court, in considering the question, said: "The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land, within the meaning of the acts referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically useless for any other purpose, and we cannot think this was the intention of Congress."

In *Merrill* v. *Dixon*, 15 Nevada, 401, the Supreme Court of Nevada held that in excluding mineral lands from the grant to the Pacific Railroad Company, Congress only intended to reserve lands valuable for mining purposes; citing the California case.

In *Cowell* v. *Lammers*, 10 Sawyer, 246, 257, the question came before the Circuit Court of the United States for the District of California, as to the meaning of mineral lands in the grant to the Pacific Railroad Company. That company having completed its road in accordance with the provisions of those acts, a patent was issued to it, the granting clause of which excepted and excluded all mineral lands, should any be found to exist in the tracts described. Judge Sawyer, in deciding the case, said: "The Land Department in this very case, as in cases of patents to preëmptioners, homestead claimants and other purchasers of the public lands, have acted, and, I think, correctly, upon the idea that patents to lands not known to be mineral lands at the time the patent issued, carry the title to all mines subsequently discovered in the lands, not-

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withstanding the reservation from sale of mineral lands in the acts of Congress. By the words 'mineral lands' must be understood lands known to be such, or which there is satisfactory reason to believe are such, at the time of the grant or patent. And the United States courts, which have had occasion to act upon this subject, so far as I am aware, have adopted that idea. *Pacific Coast Mining & Milling Co.* v. *Spargo*, 8 Sawyer, 645. There must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question, than at the time of issuing the patent. The Supreme Court has not yet had occasion to decide the point as to the effect on a patent of a discovery of a valuable mine in lands subsequently to the issue of a patent. Any other construction would be disastrous in the extreme to the holders of lands in California under United States patents. If land, which a party has actually occupied, possessed and peacefully enjoyed for a long series of years, claiming title under a patent of the United States fifteen years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty, or a hundred years hence, and the patent instead of being a muniment of title upon which the patentee, or his grantees can rest in security, would be but a delusion, and a snare."

In *United States* v. *Reed*, 12 Sawyer, 99, 104, before the Circuit Court for the District of Oregon, a bill was filed by the United States to set aside a patent issued upon a homestead entry on the ground that the land was mineral and not agricultural, and was at the date of entry more valuable for mining than for agricultural purposes, and was so to the knowledge of the patentee. Judge Deady, in disposing of the question, said: "The nature and extent of the deposit of precious metals which will make a tract of land 'mineral,' or constitute a 'mine' thereon, within the meaning of the statute, has not been judicially determined. Attention is called to the question in *McLaughlin* v. *United States*, 107 U. S. 526, but no

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opinion is expressed. The Land Department appears to have adopted a rule, that if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver; and the bill in this case is drawn on that theory of the law. In my judgment, this is the only practicable rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule, of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist or may be produced or expected in the ordinary course of such a pursuit or adventure on the land in question."

In *Dughi* v. *Harkins*, 2 Land Dec. 721, which was before the Interior Department in November, 1883, there was a contest between mineral and agricultural claimants, the land having been returned as agricultural by the surveyor general. In disposing of it the Secretary, Mr. Teller, in a communication to the commissioner of the General Land Office, said: "The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact and not theory which must control your office in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value."

In the *Case of Samuel W. Spong*, 5 Land Dec. 193, which was before the Department of the Interior in October, 1886, similar views were expressed. An application had been made by Spong to the local land officers for the Marble Valley quartz mine, in the Sacramento district, in California, which was refused by them, for the reason that the section of land

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containing the mine had been previously patented to the Central Pacific Railroad Company. On appeal, the Commissioner of the General Land Office affirmed the ruling, upon the ground that "the exception in the grant to said company and in said patent is construed to mean lands *known* to contain valuable minerals prior to the issuing of the patent, and that subsequent discoveries would not affect the title of the company to the lands and mines subsequently discovered." The case being taken to the Interior Department this decision was affirmed. In his opinion Mr. Lamar, who had succeeded Mr. Teller as Secretary of the Interior, said: "It is strenuously insisted by counsel for the appellant, that Congress did not grant mineral lands to said company; that said patent, although including said section in terms, did not operate as a conveyance of the title to any land that may at any time be found to be mineral. It is not denied that said section was returned as agricultural by the United States surveyor; that it was regularly patented to said company, without fraud or mistake on the part of the land officers or said company, so far as is shown by the record. The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent."

In *Cleghorn* v. *Bird*, 4 Land Dec. 478, and in *Commissioners of Kings Co.* v. *Alexander*, 5 Id. 126, Mr. Secretary Lamar followed the decision of Secretary Teller in *Dughi* v. *Harkins*, and in repeated cases afterwards it was not only referred to by him with approval, but also by his successor in the department, Mr. Secretary Vilas.

Rulings to the same effect upon applications for mineral patents are found in decisions of the department for many years. They are that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. If mineral patents will not be issued unless the mineral exist in sufficient quantity to render the land more valuable for mining than for other purposes, which can only be

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known by development or exploration, it should follow that the land may be patented for other purposes if that fact does not appear.

See to this purport the following decisions of the Interior Department: *Magalia Gold Mining Co.* v. *Ferguson*, 6 Land Dec. 218; *Nicholas Abercrombie*, 6 Id. 393; *John Downs*, 7 Id. 71; *Cutting* v. *Reininghaus*, 7 Id. 265; *Creswell Mining Co.* v. *Johnson*, 8 Id. 440; *Thomas J. Laney*, 9 Id. 83.

It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in *Deffeback* v. *Hawke*, already referred to, and in the cases of the *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 328, and *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 683.

In *Colorado Coal & Iron Company* v. *United States*, a bill was filed to set aside patents issued for agricultural lands, on the ground that it was known at the time of their issue that the lands contained mines of coal. But the court said: "To constitute the exemption contemplated by the preëmption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine.

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It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the preëmption act cannot be successfully assailed."

In *United States* v. *Iron Silver Mining Co.* a bill was filed to set aside certain patents on the ground that they were issued upon false representations that the land patented embraced only placer mining claims, and not any mineral veins or lodes; and the court said with reference to the uncertain proof on the subject: "It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

In connection with these views it is to be borne in mind also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands, by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade and manufactures. It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery

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of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of Congress, or that any construction should be given to the provision in question which could lead to such results. Our conclusion, as already substantially stated, is, that Congress only intended to preserve existing rights to known mines of gold, silver, cinnabar or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town-site act, and not to leave the titles of purchasers on the town sites to be disturbed by future discoveries.

In *Deffeback* v. *Hawke*, the mining patentee's rights antedated those of the occupants under the town-site law, and wherever such is the case his rights will be enforced against the pretensions of the town-site holder; but where the latter has acquired his rights in advance of the discovery of any mines and the initiation of proceedings for the acquisition of their title or possession, his rights will be deemed superior to those of the mining claimant.

It is not necessary in this case to state in what manner it must be shown that the existence of mines was known at the time the patent for the town site was issued. If the mining patent states any initiatory steps in acquiring title which antedate the title of the town site, that may suffice in an action at law. In the absence of such statement, the development and working of a mine would be a controlling fact; so also perhaps would be the location of the claim patented, and notice thereof required by law, or the custom of miners. But in this case the patent does not show any such initiatory steps; it merely refers to the entry of the mining claim, and that was after the patent was issued to the town site. No proof was offered to show when the mining claim was originally located; and it does not

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appear that the want of it was made an objection to the plaintiff's recovery, except as that may be implied from the defendant's offer to prove that at the time the patent to the Butte town site was issued to the probate judge the premises embraced by the Gold Hill lode were not known to be valuable for minerals of any kind. That proof was excluded on the ground that the mining patent to the plaintiff established that the premises contained valuable minerals. Such was the effect of the patent, if there were any jurisdiction in the Land Department to issue a mining patent at all under the circumstances of this case. Assuming for the present that there was jurisdiction, the question was not whether there were valuable minerals at the time that patent was issued, but whether such minerals were known to exist within the premises at the date of the town-site patent to the probate judge. The plaintiff not having offered any proof upon this point, but having relied upon the fact as a matter of presumption merely, the defendant should have been permitted to establish the negative of it. The absence of any proceedings required by law or the custom of the mining district to initiate a right to a mining claim, which he might perhaps have shown, would have been very persuasive that no mine was then known to exist. We think the court erred in excluding the proof of the defendant.

When the patent to the mining company was offered in evidence an objection was taken on the ground that the exception contained in it excluded all town lots from the grant, and it was necessary for the plaintiff to show that the property in controversy did not consist of lots thus excepted. The exception in the patent went only to the exclusion of the lots from interfering with the surface of the land granted with the mining lode. But we do not attach any importance to the exception, for the officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without

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warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers. *Deffeback* v. *Hawke*, 115 U. S. 392, 406.

If after the introduction of the town-site patent and the deed to the defendant the objection had been raised to the jurisdiction of the Land Department to issue the patent in question for minerals in lands which had been previously conveyed to the defendant, a much more serious question would have been presented. The laws of Congress provide that valuable mineral deposits in lands of the United States shall be open to exploration and purchase. They do not provide, and never have provided, that such mineral deposits in lands which have ceased to be public, and become the property of private individuals, can be patented under any proceedings before the Land Department, or otherwise. Proceedings for the acquisition of title to a mining claim within a town site, commenced before the issue of a town-site patent, could undoubtedly be prosecuted to completion afterwards. The right initiated by the location of the mining claim would not be defeated by a subsequent conveyance of the title to the land in which the mining claim was situated. But it is not perceived where the jurisdiction exists under the laws of the United States to grant a patent for a mine on lands owned by private individuals — which was the case here — if the lots for which the defendant received a deed were included within the town-site patent and the location of the mining claim was subsequently made. Nor is there in this statement anything at all inconsistent with the decision of this court in *Steel* v. *Smelting Co.*, 106 U. S. 447. We stated there that land embraced within a town site on the public domain, when unoccupied, was not exempt from location and sale for mining purposes, and referred to the fact that some of the most valuable mines in the country were within the limits of incorporated cities, which had grown up on what was on its first settlement a part of the

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public domain. We were speaking at that time of town sites for which no patent had been issued, and of mines in public lands; for, immediately after using these expressions, we said: "Whenever, therefore, mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with."

It must be borne in mind also that town sites on the public domain in many instances, and probably in the greater part of them, embrace a much larger tract of country than is included in a patent for such town sites. The United States laws limit the quantity that shall be included within the patent of such a town site to the number of its inhabitants. Where there are over 100 and less than 200 inhabitants the patent can only embrace lands not exceeding 320 acres; where the inhabitants number more than 200 and less than 1000 it cannot embrace more than 640 acres; and where the inhabitants are 1000 or more it cannot exceed 1280 acres. For each additional thousand inhabitants, not exceeding 5000, a further grant of only 320 acres is allowed. Valuable mineral deposits in such lands outside of the patent are equally open to exploration and purchase as those in lands outside of the town site. It was in reference to mines in unoccupied public lands in unpatented town sites that the language in *Steel* v. *Smelting Co.* was used, and to them and to mines in public lands in patented town sites outside of the limits of the patent it is only applicable.

We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unassailability in such cases in the strongest terms, both in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640–646, and in *Steel* v. *Smelting Co.*, 106 U. S. 447, 451, 452. They are conclusive in such actions of all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters, and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or

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other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed.

In the several cases to which we have been referred in the fifth and sixth Montana Reports, *Silver Bow Mining & Milling Co.* v. *Clark*, 5 Montana, 378; *Talbott* v. *King*, 6 Montana, 76; *Butte City Smoke-house Lode Cases*, 6 Montana, 397; which involved contests between parties claiming under mining patents and others claiming under town-site patents, and in which very able and learned opinions were given by the Supreme Court of the Territory of Montana, the mining claim patented had been located and the rights of the mining claimant had thus attached before the town-site patent was issued. The patent which subsequently followed was a mere perfection of the right originated by the location, and to which it took effect by relation. It was held, in accordance with this opinion, that the prior mining location was not affected by the town-site entry.

It follows from the views expressed that the judgment of the Supreme Court of the Territory of Montana must be

Reversed, and the cause remanded to the Supreme Court of the State, with directions to order a new trial in the proper trial court; and it is so ordered.

UNION EDGE SETTER COMPANY *v.* KEITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 283. Argued March 20, 23, 1891. — Decided April 6, 1891.

The first claim under letters patent No. 173,284, dated February 8, 1876, granted to Charles H. Helms for an improvement in sole-edge burnishing machines, namely, "in combination with the burnishing tool, and the rest for the face of the sole, the finger-rest D, substantially as described" falls within the many rulings of this court, holding that a mere aggregation of old elements in a new relation is not the subject of a patent.

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Statement of the Case.

THIS was a bill in equity for the infringement of letters patent No. 173,284, issued February 8, 1876, to Charles H. Helms for an improvement in sole-edge burnishing machines. In the introduction to his specifications, the patentee stated that his machine consisted "of a head or standard carrying a tool holder, holding a tool for setting or burnishing the edges of the soles of boots and shoes, and a finger-rest to aid the workman in holding the edge up to the tool, and the face of the sole against the rest, which is just below the burnishing part of the tool." After describing his machine by reference to the drawings, he stated his operation to be as follows: "The workman holds the shoe firmly in his hands, and thus presents the edge to be burnished to the tool, which reciprocates with great rapidity — about 1800 times per minute, I find, gives the best results. The workman passes [presses] the edge up against the tool, and the face of the sole against the surface which projects below the tool, and gradually moves the shoe so as to bring all parts of the edge to its action, steadying the shoe by the aid of the finger-rest D, especially when burnishing the corners of the toes. A little experience is necessary to enable the workman to use the machine to great advantage, but a skilled workman can do a very large quantity of work, second to none in quality. The combination of the finger-rest D with the burnishing tool, and the rest for the face of the sole, is the main feature of my invention."

The only claim alleged to be infringed was the first, which reads as follows:

"In combination with the burnishing tool and the rest for the face of the sole, the finger-rest D, substantially as described."

There were two other patents originally set forth in the bill, but by stipulation they were stricken out.

The defences set up in answer were, 1, the invalidity of the first claim of the patent, which was the only one relied upon by the plaintiff, and, 2, non-infringement.

Upon the hearing in the Circuit Court, the bill was at first sustained, but upon a rehearing, dismissed. The first opinion of the court is reported in 28 Fed. Rep. 715, and the opinion upon rehearing in 31 Fed. Rep. 46.

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The errors assigned were:

1. That the court decided that the combination set forth in the first claim was not patentable.

2. That the court decided that neither of the three elements of the combination named in the first claim performed any new function.

Mr. J. E. Maynadier for appellant.

Mr. John L. S. Roberts for appellee.

Mr. Justice Brown delivered the opinion of the court.

The machine described in this patent is designed for burnishing the edges of the sole of a boot or shoe after it has been trimmed by a cutter to the desired shape, and consists of a combination of three elements:

1. A tool for burnishing sole edges;
2. A lip or guard, which forms part of the tool;
3. A finger-rest.

After the sole is outlined and cut in proper shape, it is first required to be trimmed, and then to be burnished, so as to present a neat and finished appearance. The burnishing tool must be of the same shape in outline as the trimming tool, in order to properly burnish the parts of the edge which have been shaved or trimmed by the cutting tool. Cutting or trimming the edge of the sole and burnishing the same with a tool have been practised time out of mind in the art of making shoes; but within the past fifty years there has grown up a separate business in the manufacture of edge trimmers and edge burnishers, the outline of each tool corresponding with that of the other. The machine shown and described in the Helms patent in suit consists of a reciprocating tool-holder, carrying an ordinary burnishing tool, and an adjustable finger-rest or hook, the front surface of which projects just below the tool. The function of the tool is to burnish the edge of the sole in the same manner as when the sole is burnished by hand, the face of the burnishing tool corresponding to that of the cutter which has been used to trim the edge to the desired shape.

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The function of the finger-rest or hook is to furnish a support to the finger and steady the hand of the operator when burnishing the sole edge, especially when burnishing the corners of the toe.

The controversy between these parties turns largely upon the meaning of the words "rest for the face of the sole," as used in the first claim of the patent, which reads as follows: "In combination with the burnishing tool and the rest for the face of the sole, the finger-rest D, substantially as described." While these words are used several times in the specifications, the rest is nowhere exactly located, nor is it lettered or otherwise indicated upon the drawing. The plaintiff contended that it referred to the guard or lower flange of the burnishing tool, which it claimed performed this additional function of affording a rest for the face of the sole, while the defendant insisted that it referred to the upper part of the finger-rest or hook.

If it refers to the upper part of the finger-rest, then it is admitted that the defendant does not infringe; if it refers to the lower flange of the burnishing tool, a further question arises as to whether there is any novelty in the combination.

Some light is thrown upon this question by a reference to the file wrapper and contents, which are spread upon the record. In his original application Helms states that his machine consists "of a head or standard carrying a tool-holder holding a tool for setting or burnishing the edges of the soles of boots and shoes, and a finger-rest to aid the workman in holding the edge up to the tool." This finger-rest D he describes as a "hook-shaped piece secured to the head near the tool, as shown in the drawings. For convenience it is mounted upon a tang, which is held by a set screw. It should be made of some non-conductor of heat, or else be wrapped with some non-conducting wrapper." In its operation he says "the workman presses the edge up against the tool and gradually moves the shoe so as to bring all parts of the edge to its action, steadying the shoe by the aid of the finger-rest D, especially when burnishing the corners of the toes." He winds up his specification by saying that "the finger-rest D is the main feature of my invention, all the other points of

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novelty of my machine relating to new combinations of old elements," and claims —

1. In a burnishing machine the finger-rest D, constructed and operating substantially as described.

2. The combination of the finger-rest D, the burnishing tool, and the elastic holder B, as set forth.

The third claim is immaterial.

One thing is clearly apparent from this, and it cannot be better stated than the patentee himself has stated it, namely, that the finger-rest D was the main feature of his invention. To this application for a patent the examiner having the matter in charge replied that his first claim was anticipated in the patent of B. J. Tayman, March 11, 1873, No. 136,790. The Tayman patent, which is made an exhibit, shows a finger-rest identical with that of the patent in suit. In view of this rejection he amended his application by erasing the first clause of his claim, and substituting the following: "1. In combination with the burnishing tool, and the rest for the face of the sole, the finger-rest D, substantially as described." To this the examiner replied as follows: "Attention is called to the fact that the finger-rest in the above-cited case is stated to be the main feature of the alleged invention. A rest for the same purpose is shown in Tayman's patent, and the other elements claimed in combination have been shown by the references to be old separately, and if the finger-rest performs any new function in this instance, in combination with the tool and holder here used, it should be clearly stated. It is not understood what is meant by the words in the first claim now presented, viz., 'the rest for the face of the sole.' Additional amendment is therefore necessary before the case can be further considered."

Again the patentee amended his application, 1st, by inserting immediately after the words "to aid the workman in holding the edge up to the tool," the words "and the face of the sole against the rest which is just below the burnishing part of the tool." 2d. By inserting immediately after the words "the workman presses the edge up against the tool," the words "and the face of the sole against the surface which projects below

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the tool." It will be observed here that in this first amendment the rest is described as just below the burnishing part of the tool. If the burnishing part of the tool be confined to the flat portion or bed, then the word "rest" would indicate that it was intended to apply to the lower flange. But amendment 2 would indicate that by the rest was meant the surface which projects below the tool, not below the burnishing part of the tool; and, therefore, forming no part of the tool, which would tend to support the claim of the defendant that it was intended to apply to the upper part of the finger-rest, which is the only surface which projects below the tool. 3. By erasing the paragraph immediately before the words "What I claim as my invention is," and substituting therefor the following: "The combination of the finger-rest D with the burnishing tool and the rest for the face of the sole is the main feature of my invention; all the other points of novelty in my machine also relate to new combinations of old elements." This also would indicate that the rest for the face of the sole was something distinct, both from the finger-rest and from the burnishing tool, which is impossible, as it must necessarily form a part of one of them.

The changes between the specification and claims contained in his original application and those finally allowed, are shown in the following parallelism, the amendments being italicized:

Original Specification.	*Patent allowed.*
"My machine is extremely simple, and consists of a head or standard carrying a tool-holder holding a tool for setting or burnishing the edges of the soles of boots and shoes, and a finger-rest to aid the workman in holding the edge up to the tool.	"My machine is extremely simple, and consists of a head or standard carrying a tool-holder holding a tool for setting or burnishing the edges of the soles of boots and shoes, and a finger-rest to aid the workman in holding the edge up to the tool, *and the face of the sole against the rest which is just below the burnishing part of the tool.*

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"The workman presses the edge up against the tool and gradually moves the shoe so as to bring all parts of the edge to its action, steadying the shoe by the aid of the finger-rest D, especially when burnishing the corners of the toes.	"The workman presses the edge up against the tool, *and the face of the sole against the surface which projects below the tool*, and gradually moves the shoe so as to bring all parts of the edge to its action, steadying the shoe by aid of the finger-rest D, especially when burnishing the corners of the toes.
"The finger-rest D is the main feature of my invention, all the other points of novelty in my machine relating to new combinations of old elements.	"The *combination of the* finger-rest D *with the burnishing tool and the rest for the face of the sole* is the main feature of my invention; all the other points of novelty in my machine also relate to new combinations of old elements.
"What I claim as my invention is, First. In a burnishing machine, the finger-rest D, constructed and operating substantially as described."	"What I claim as my invention is, 1. *In combination with the burnishing tool and the rest for the face of the sole*, the finger-rest D, substantially as described."

From this it is entirely clear that the patentee supposed originally that he was the inventor of the finger-rest, but upon being referred to the Tayman patent, and finding that he had been anticipated, he resorted to the device of "a rest for the face of the sole" to save his patent. Not only is the location of this rest left in considerable doubt as a matter of construction from the face of the patent, but the oral evidence as to the intention of the patentee, and as to the actual operation of the machine, is scarcely less ambiguous. When first called as a witness, the patentee Helms stated: "What I intended to be the rest for the face of the sole, when burnishing a shoe edge, was a finger-hook so constructed that it would at once answer for a rest of the sole of a shoe, and a

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guide to help the operator to steady the shoe under the action of the polisher while in motion by grasping the hook with his finger."

In answer to the question, "Please point out upon the exhibit Helms's model, the part referred to in the patent as the rest for the face of the sole?" he said, "That part I should designate as below the polisher and on the front of the hook." He again states that it was his original intention to keep the tread or bottom of the sole in contact with the face of the finger-hook while burnishing the toe portion of the shoe, and that it was feasible on a great many kinds of goods. He also states that the drawing of the patent shows, according to his judgment, that the tread or bottom of the sole does not touch the front face of the finger-rest, "which appears to me to differ somewhat from the real intention shown by me." On being subsequently recalled, however, and being shown the Patent Office model of his patent, he says he should not think it possible to polish the sole properly on a machine of that pattern while holding the face of the sole against the finger-rest; and upon being asked what he intended to be the rest for the face of the sole in burnishing sole edges with such machine at the time he filed his application for patent, says: "I shall have to say that when I filed the application for this patent, which the model represents, that it must have been the back lip of the polisher shown in the model." In fact his testimony is so confused and contradictory that it is impossible to make anything out of it, except that, on finding his finger-rest to have been anticipated, he fell back upon the rest for the face of the sole, as a *dernier resort*, to save his patent, without clearly understanding in his own mind what was meant by the words.

A witness who had used the machine at a factory in Albany testified, that during four seasons he burnished sole edges on the Helms machine, always resting the face of the sole against the finger-hook. Another, who was foreman of a shop at Brockton, Mass., testified that when the machine was first used they placed the face of the shoe against the tool, and the face of the sole against the finger-rest, and so used it for

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about four weeks. It would appear from this testimony that the patentee's original idea was that the front face of the finger-rest constituted a rest for the face of the sole, and that in accordance therewith the first machines were made with the finger-rest projecting far enough forward under the burnishing tool to furnish a rest for the sole. This, however, was found to be impracticable, and the use of the upper part of the finger-hook as a rest seems to have been abandoned, and the claim made that the lower flange was intended as a rest. The truth seems to be that, if the finger-rest be moved far enough forward and the front surface shaped at the proper angle, the face of the sole can be rested thereon, but when moved some distance back it becomes impracticable.

We do not find it necessary, however, to express a decided opinion as to the construction of this patent. In view of the ambiguity of the language used, and of the confusion and contradiction in the oral testimony, we prefer to adopt the construction contended for by the plaintiff, and dispose of the case upon another ground. Conceding the plaintiff's construction to be correct, and reading the first claim as if the rest for the face of the sole were a distinct element, we find the combination of this claim to consist, 1, of a burnishing tool; 2, a flange at the lower edge of such tool, against which the operator may rest the sole; 3, a finger-rest. All of these elements are old. Burnishing tools have been employed for finishing off the edges of boot soles from time immemorial, and the flange or guard which the patentee dignifies as a rest for the face of the sole was attached to the old hand tools before the invention of burnishing machines, and has since been attached to machines operated by power, as shown in patent No. 28,181, to Elias T. Ingalls, which describes a reciprocating tool having a flange or guard, called in the patent "a horizontal lip," which bears on the face of the sole. It may be true that Helms was the first to use a burnishing tool having a guard, in connection with a finger-rest, and that his machine is probably superior to other devices of like design, but as all of these elements were old, and no new function is performed by the combination, it is a case of mere aggrega-

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tion, which it is well settled is not patentable. The Tayman patent shows the finger-rest in connection with a cutter for trimming the edge of the sole, at one end of a shaft, at the other end of which is a revolving burnisher, to which Tayman did not see fit to attach his finger-rest. It certainly did not require invention to change the finger-rest from one end of the shaft to the other, or to attach it to a reciprocating instead of a revolving burnisher, both being old, nor does it add to its importance to change the name of the guard or lip, and call it a rest for the face of the sole.

Undoubtedly the result is a more perfect machine, but it is simply more perfect because of the coöperation of a greater number of elements, and not because of any new function performed by the combination. Counsel for the plaintiff has made a most ingenious argument to show that a new function is performed by the combination in determining the tilt or slant of the sole by the angle required of the edge with the tread. But that is rather an incident to the operation of the machine, attributable to the skill and deftness of the operator, than any new and distinct function belonging to the machine itself.

If any separate function had been performed by this combination, it is somewhat singular that the patentee did not call attention to it in his original application, or until after the main feature of his patent was shown to have been anticipated. We think that this patent falls within the many rulings of this court holding that a mere aggregation of old elements in a new relation is not the subject of a patent. *Reckendorfer* v. *Faber*, 92 U. S. 347; *Pickering* v. *McCullough*, 104 U. S. 310; *Stephenson* v. *Brooklyn Cross-Town Railroad*, 114 U. S. 149; *Hendy* v. *Miners' Iron Works*, 127 U. S. 370; *Hailes* v. *Van Wormer*, 20 Wall. 353.

It results that the decree of the court below dismissing the bill must be

Affirmed.

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BROWN CHEMICAL COMPANY *v.* MEYER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 226. Argued March 18, 1891.—Decided April 6, 1891.

Words which are merely descriptive of the character, qualities or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade mark.

An ordinary surname cannot be appropriated as a trade mark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use even of one's own name, where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it.

The owner of a trade mark, bearing his own name, which is affixed to articles manufactured at a particular establishment, may, in selling the latter, confer upon the purchaser exclusive authority to use the trade mark.

THIS was a suit in equity instituted by the Brown Chemical Company, a corporation organized under the laws of Maryland, against the firm of Meyer Brothers and Co., of St. Louis, in the State of Missouri, to restrain an unfair competition in trade. The bill averred, in substance, that plaintiff had been engaged in the preparation of a certain medicine, which had acquired a high reputation as a remedy for the prevention and cure of many diseases; that in 1879 it devised and used a certain label, consisting of four sides or panels, the front one of which bore the representation of a lion's head, above which was printed the word "Brown's;" in the mouth of the lion was suspended a rod or bar, having dependent therefrom a banner or streamer, bearing the words "Iron Bitters," printed in large, conspicuous letters, and separated by a circular design occupying the central field of the banner. The three remaining panels had also printed thereon the words "Brown's Iron Bitters," in various places, and arranged as shown in the label; that since plaintiff acquired its right in the premises the defendants fraudulently offered and sold medicine put up in bottles, to which labels were attached, containing the words "Brown's Iron

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Tonic," which were intended to indicate that the medicine contained in said bottles was that prepared by the plaintiff, which said preparation the defendants had fraudulently caused to be offered and sold as and for plaintiff's preparation; and that large quantities of "Brown's Iron Tonic" had been sold as and for plaintiff's "Brown's Iron Bitters," and frequently mistaken therefor.

The answer admitted most of the allegations of the bill so far as they related to the preparation and sale of Brown's Iron Bitters, denied any fraudulent intent with respect to defendants' own label, and averred that in the summer of 1881 one E. L. Brown, in connection with one C. J. Lincoln, commenced putting up and selling Brown's Iron Tonic at Little Rock, Arkansas, as a wholly distinct preparation from Brown's Iron Bitters, and with no intention or purpose of imitating plaintiff's preparation, which at that time had not been advertised or sold to any great extent; that subsequently Brown sold out his interest in said preparation to Lincoln, who has since that time been putting up said medicine and offering it to the public in cartons and bottles wholly different in size, color and appearance from plaintiff's bottles, and with labels attached to the bottles wholly different in size, color, appearance and details from plaintiff's labels, and enclosed in wrappers very different from the cartons of Brown's Iron Bitters, so that the public could not be misled or the plaintiff injured.

The case as made by the respective parties did not differ materially from their pleadings.

In explanation of the manner in which defendants' preparation originated, Brown swore that from August, 1869, to May 1, 1881, he was travelling salesman for a Louisville wholesale drug house, and during that time travelled extensively in the Southwest, and became generally known to the trade. In May, 1881, he formed a partnership with C. J. Lincoln, of Little Rock, which was dissolved in December, 1883. The firm name was part of the time C. J. Lincoln, and part of the time Lincoln & Brown. Brown did not personally go to Little Rock until December, 1881, when, following out a preconceived notion, he instructed the chemist of the firm to prepare a for-

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mula, and they devised a label and began to advertise the preparation through the newspapers and travelling salesmen. They sold some at retail in 1881, of which no record was kept. In the spring of 1882 they began to make sales to the trade. It does not appear that they knew of Brown's Iron Bitters, or that they had seen it until after they had determined upon their own remedy and its label. The opinion of the Circuit Court dismissing the bill is reported in 31 Fed. Rep. 453.

Mr. Rowland Cox for appellant.

Mr. J. E. McKeighan for appellees.

Mr. Justice Brown delivered the opinion of the court.

The general proposition is well established that words which are merely descriptive of the character, qualities or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade mark; *Canal Company* v. *Clark*, 13 Wall. 311; *Manufacturing Company* v. *Trainer*, 101 U. S. 51; *Caswell* v. *Davis*, 35 N. Y. 281; *Thomson* v. *Winchester*, 19 Pick. 214; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; and we think the words "Iron Bitters" are so far indicative of the ingredients, characteristics and purposes of the plaintiff's preparation as to fall within the scope of these decisions. It is hardly necessary to say that an ordinary surname cannot be appropriated as a trade mark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use even of one's own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it. *McLean* v. *Fleming*, 96 U. S. 245; *Goodyear Company* v. *Goodyear Rubber Company*, 128 U. S. 598; *Russian Cement Co.* v. *LePage*, 147 Mass. 206; *Hoxie* v. *Chaney*, 143 Mass. 592. The distinction between the lawful and the unlawful use of one's own name is illustrated in the case of *Croft* v. *Day*, 7 Beavan, 84, in which the successor of Day and Martin, originators of the

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famous blacking, filed a bill to enjoin the defendant Day, a nephew of the elder Day, who had commenced business as a blacking maker, and was using a label of the same color and size, with the letters arranged precisely the same and with the same name, "Day and Martin," on the boxes. The defendant was enjoined, the court placing its decision, not upon any peculiar or exclusive right that the plaintiff had to use the name of Day and Martin, but upon the fact of the defendant using the names with certain circumstances, and in a manner calculated to mislead the public. The court observed: "He (the defendant) has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to deprive him of that or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public." In *Holloway* v. *Holloway*, 13 Beavan, 209, Thomas Holloway had for many years made and sold pills and ointments under the label "Holloway's Pills and Ointments." His brother Henry Holloway subsequently manufactured pills and ointments with the same designation. The pill-boxes and pots (of ointment) of the latter were similar in form to, and were proven to have been copied from, those of the former. The Master of the Rolls in granting the injunction said: "The defendant's name being Holloway, he has a right to constitute himself a vendor of Holloway's pills and ointments, and I do not intend to say anything tending to abridge any such right. But he has no right to do so with such additions to his own name as to deceive the public, and make them believe that he is selling the plaintiff's pills and ointments. The evidence in this case clearly proves that pills and ointments have been sold by the defendant, marked in such a manner that persons have purchased them of the defendant, believing that they were buying goods of the plaintiff." The principle of this case was approved by this court in the case of *McLean* v. *Fleming*, 96 U. S. 245, in which a person was enjoined from using his own name in connection with certain pills, upon the ground that they were put up in such form that purchasers exercising ordinary caution were

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likely to be misled into buying the article as that of the plaintiff. These cases obviously apply only where the defendant adds to his own name imitations of the plaintiff's labels, boxes or packages, and thereby induces the public to believe that his goods are those of the plaintiff. A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances are cases of *damnum absque injuria.* In the present case, if the words are not in themselves a trade mark, they are not made a monopoly by the addition of the proprietor's name, provided, of course, the defendant be legally entitled to make use of the same name as connected with his preparations.

The theory of a trade mark proper then being untenable, this case resolves itself into the question whether the defendants have, by means of simulating the name of plaintiff's preparation, putting up their own medicine in bottles or packages bearing a close resemblance to those of plaintiff, or by the use of misleading labels or colors, endeavored to palm off their goods as those of the plaintiff. The law upon this subject is considered in the recent case of *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537. The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market. In this case, the usual indicia of fraud are lacking. Not only do defendants' bottles differ in size and shape from those of the plaintiff, but their labels and cartons are

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so dissimilar in color, design and detail that no intelligent person would be likely to purchase either under the impression that he was purchasing the other. There are certain resemblances in the prescriptions and instructions for the use of the respective preparations, but no greater than would be naturally expected in two medicinal compounds, the general object of which is the same. Under such circumstances, a certain similarity in the methods of using and recommending them to the public is almost unavoidable. While the resemblances in this case are perhaps too great to be considered the result of mere accident, the dissimilarities are such as to show an intention to avoid the charge of piracy. The similarities in the advertising cards or posters are undoubtedly much greater, — both being a deep yellow in color, with an arrangement and shape of letters closely approaching identity, and, if this resemblance had been carried into the labels, we should have regarded it as strong evidence of a fraudulent intent; but as it appears from the testimony that the use of these posters has been discontinued, and further that the defendants in this case never employed them or put them up, or authorized others to do so, it is clear that as against these defendants the court cannot now be properly called upon to enjoin them. If the bare act of posting these advertising cards were fraudulent, the remedy is against the party who committed the wrong. That act does not affect the labels on the bottles, with which alone the defendants are concerned, and it has relation only to a mode of advertising, distinct from the medicine as offered to the public by the defendants.

In the published drug list of C. J. Lincoln & Co., the manufacturers of defendants' preparation, they advertised both of these articles, one under the head of "bitters" and the other under the head of "tonics." Defendants' testimony shows that while they have sold but a few gross of Brown's Iron Tonic, they have been selling the Iron Bitters since October, 1881, in large quantities. The testimony of a number of druggists doing business at Little Rock indicates that the two preparations are known to the trade and purchasers as distinct and separate, and that one is never mistaken for the

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other. That the plaintiff itself did not consider that Lincoln & Co. were infringing upon its rights is evident from the correspondence between them in the summer of 1882. From this correspondence it appears that Lincoln & Co. were dealing with the plaintiff, which wrote them under date of August 21, 1882: "We notice you are manufacturing a Brown's Iron Tonic. Is this a new medicine? If so, are you not trespassing upon our rights, etc.?" To this Lincoln & Co. replied, saying that they had begun the manufacture of the Iron Tonic since the admission of Mr. E. L. Brown into their firm, in May, 1881, enclosing them a bottle of the preparation, and assuring them that they had no desire to make money upon their good reputation, and had never attempted to sell their tonic as that of the plaintiff. To this the plaintiff replied as follows:

"BALTIMORE, MD., *August* 28, 1882.

"Messrs. C. J. LINCOLN & Co.,
Little Rock, Ark.

"GENTLEMEN: Enclosing your invoice, thank you for your kind and satisfactory letter. We wish the Brown's Iron Tonic a success, as, upon examination, we cannot see where it conflicts with us except in the multiplicity of the Brown family. Your friends,

"BROWN CHEMICAL COMPANY."

Indeed, the controversy between these parties seems to have arisen some months afterward, through a trade circular issued by Lincoln & Co., in the autumn of 1882, in which they called attention to the distinction between the bitters and the tonic as rival remedies, and offered the latter at a lower price, at the same time recommending it as a superior remedy. While of course the plaintiff is not estopped by this letter to claim an infringement of its rights, it tends very strongly to show that the persons who were most actively interested in putting an end to this alleged fraud were satisfied in their own minds that no fraud was intended. The testimony is particularly cogent in view of the fact that suit was not begun until nearly four years after the letter was written.

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The right of the plaintiff to maintain this bill then must rest upon the assumption that the words "Brown's Iron Tonic" bear such a resemblance in sound and appearance to the words "Brown's Iron Bitters" that the public are liable to be misled. But if the words "Iron Bitters" cannot be lawfully appropriated as a trade mark, it is difficult to see upon what theory a person making use of these or similar words can be enjoined. We understand it to be conceded that these words do not in themselves constitute a trade mark; it follows then that another person has the right to use them, unless he uses them in such connection with other words or devices as to operate as a deception upon the public. If the defendants be liable at all, then it must be by the addition of the patronymic "Brown" to the words "Iron Tonic." But the evidence shows that the preparation was originally compounded by a person of that name of whom the present manufacturers are the successors in business, and, in the absence of testimony tending to show an intention to palm off their preparation as that of the plaintiff, they have a right to such use.

It is claimed, however, that, even conceding Brown's right to use his own name as connected with the manufacture of the Iron Tonic, he could not transfer such right to a person of different name, and thereby authorize the latter to make use of it. Whatever may have been the respective rights of Brown and Lincoln to this name, the plaintiff does not stand in a position to question the right of Brown to transfer his interest in the business, and to include in such transfer the right to the use of his name in connection with the preparation of the tonic, as part of the good will of the business. In the case of *Kidd* v. *Johnson*, 100 U. S. 617, 620, it was held that the owner of a trade mark which is affixed to articles manufactured at his establishment may, in selling the latter, lawfully transfer to the purchaser the right to use the trade mark, and, in delivering the opinion of the court, Mr. Justice Field observed: "But when the trade mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law

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to others, the right to the use of the trade mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred, is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer."

So in *Menendez* v. *Holt*, 128 U. S. 514, it was held that when a partner retires from a firm, assenting to, or acquiescing in the retention by the other partners of the old place of business, and the future conduct of the business by them under the old name, the good will remains with the latter, as of course, and that, under such circumstances, the right to use a trade mark passes to the remaining partners as a part of such good will. There are a few cases indicating that the mere right to use a name is not assignable, notably *Chadwick* v. *Covell*, 151 Mass. 190, but none that it may not be assigned to an outgoing partner or to a successor in business as an incident to its good will. *Ainsworth* v. *Walmesley*, L. R. 1 Eq 518; *Derringer* v. *Plate*, 29 California, 292.

There was no error in the decree of the court below, and it is therefore

Affirmed.

In re INGALLS, Petitioner.

ORIGINAL.

No number. Submitted March 16, 1891. — Decided March 23, 1891.

No application to this court for a writ of error will be entertained, except when a Justice of this Court, upon consideration of the record, has deemed it proper, under special circumstances, to endorse thereon a request that counsel be permitted to proceed in that way.

THE case is stated in the opinion.

Mr. de Lagnel Berier for petitioners submitted on his brief. *Mr. Edward D. McCarthy* also filed a brief for petitioners.

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Mr. George W. Van Slyck for Elizabeth A. L. Hyatt, opposing.

PER CURIAM. This is an application for a writ of error made to the court in session, under the apprehension on the part of counsel that it was directed to be so presented. We have, therefore, considered it, with the result that the writ must be denied. *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46; *Walter A. Wood Co.* v. *Skinner*, *ante*, 293.

We wish it to be distinctly understood that in future no such application will be entertained, except when a Justice of this Court, upon consideration of the record, has deemed it proper under special circumstances to endorse thereon a request that counsel be permitted to proceed in that way.

Writ refused.

FOWLER v. HAMILL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 4. Argued and submitted March 31, 1891. — Decided April 13, 1891.

A decree dismissing the bill was entered April 21, 1883. Judgment for costs was rendered June 16, 1883. The appeal was allowed June 16, 1885, on an application made June 15, 1885. *Held*, that the decree of April 21 was the final decree; but that, even if the judgment of June 16 was the final decree, the allowance was too late to enable this court to take jurisdiction.

THE case is stated in the opinion.

Mr. J. E. Hindon Hyde for appellant. *Mr. Frederic H. Betts* was on the brief.

Mr. Howard A. Sperry for appellee submitted on his brief.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Fowler, deceased, claimed as having by assignment become the owner of all the interest of one McClosky in the subject

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matter of this suit, and in certain letters patent, in respect to which the bill herein was filed by McClosky against Hamill. A decree dismissing the bill was entered in the Circuit Court on April 21, 1883. Judgment for costs was rendered June 16, 1883. The record does not show the judgment of June 16, but the petition for appeal states that "on the 21st day of April, 1883, a decree was made in said suit and duly entered, whereby it was ordered, adjudged and decreed that the said bill of complaint be dismissed, and that the said McClosky pay to the above-named respondent the costs of said suit, to be taxed, and thereupon the said costs were taxed; and on the 16th day of June, 1883, the final decree was entered in said cause, including judgment for the amount of said costs as taxed, and execution was duly issued for said costs, etc."

The application for the allowance of an appeal was dated June 15, and the appeal allowed June 16, 1885. The citation was signed June 16 and the appeal bond executed June 17, 1885. The petition for and allowance of appeal and the citation were filed in the Circuit Court June 19, and the appeal bond June 17, 1885.

The final decree was that of April 21, 1883, and the appeal was not taken in time. Rev. Stat. § 1008; *Silsby* v. *Foote*, 20 How. 290. And had the judgment for costs of June 16, 1883, been the final decree, still the result must be the same, as the papers on appeal were not filed in the Circuit Court within two years thereafter. *Credit Co.* v. *Arkansas Cent. Railway Co.*, 128 U. S. 258. The appeal must therefore be

Dismissed.

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INLAND AND SEABOARD COASTING COMPANY v. TOLSON.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 229. Argued March 19, 1891. — Decided April 6, 1891.

In an action by a wharfinger against a steamboat company for crushing his foot between the timbers of a wharf by the violent striking of a steamboat against the wharf, while touching there to receive freight from him, in calm weather, there was conflicting testimony from the plaintiff and from those on board the steamboat as to the negligence of either party, including evidence that the plaintiff, immediately after the injury, and again the next morning, admitted that he was hurt by his own fault. *Held*, that the defendant had no ground of exception to the following instructions:

(1) That the shock and pain might render the plaintiff incapable of telling exactly how the thing took place, and that his making different statements at different times did not necessarily imply an intention to mislead, and therefore the jury might look at any difference in his statements in that point of view.

(2) That it would be *prima facie* evidence of the defendant's negligence, if the steamboat was thrown with such force against a wharf properly built as to tear up some of the planks; or if it was dangerous to make a stern landing, with neither captain nor pilot in the pilot-house, and under the other circumstances proved.

(3) That any negligence of the plaintiff, directly contributing to the injury, would incapacitate him from recovering; and that if he negligently placed his foot between timbers of the wharf, and allowed it to remain there while the steamboat was departing, and it was injured while so placed, it was for the jury to decide whether there was such negligence as would disentitle him from recovering.

(4) That the burden of proof was on the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury.

(5) That contributory negligence of the plaintiff would not prevent him from recovering, if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

Whether a particular position on a wharf is a safe place for the wharfinger to stand, while a steamboat is approaching to take off freight or to make a landing, is a question for the jury, and not for opinions of witnesses.

THE case is stated in the opinion.

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Mr. Walter D. Davidge and *Mr. Nathaniel Wilson* for plaintiffs in error.

Mr. C. C. Cole and *Mr. A. A. Birney* for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action brought March 11, 1884, by Tolson against the Inland and Seaboard Coasting Company to recover damages for the crushing of his foot by the negligent management of a steamboat of the defendant. The plaintiff recovered a verdict for $8000, judgment on which was affirmed in general term. 6 Mackey, 39. The defendant sued out this writ of error.

At the trial it appeared that the plaintiff was the owner and wharfinger of a wharf in the Potomac River, known as Shamrock pier, built on piles, in a suitable and substantial manner, early in 1883, and the front of which, twelve feet long, was parallel with the channel of the river, and had three heavy fender piles at each corner; that on September 15, 1883, the plaintiff, having a small basket of pears and an empty demijohn to put on board the defendant's steamboat for Washington, neglected to signal her as she came up the river, and hailed her as she was passing the wharf, whereupon she backed in to make a stern landing, and struck the piles at the lower end of the wharf with considerable force; that at that time the weather was calm and the tide just turned flood, and neither the captain nor the pilot was in the pilot-house.

The plaintiff testified that, while he was standing near the edge of the wharf by the capstan post, ready to catch a line to be thrown from the steamboat, she struck the wharf with such force as to start and break the plank flooring, and to catch and crush his left foot between the planks and that post; and that at that moment the mate of the steamboat reached over and took the basket from his hand.

The defendant called as witnesses the pilot and others on

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board the steamboat, who testified that the plaintiff, as the steamboat neared the wharf, called out that there was no need to throw a line, and leaned over and handed the basket and demijohn to the mate, and the mate gave the signal to go ahead, and he and the plaintiff shook hands and joked together, and the boat then struck the wharf, and jammed the plaintiff's foot between the wharf and one of the fender piles; that the boat was then turned about and made a bow landing at the wharf for the purpose of rendering the plaintiff assistance, and the plaintiff was taken ashore, and then and there, in the presence of the mate and others, said "that he was hurt by his own fault, that he was standing in a dangerous position." The defendant also introduced evidence that the plaintiff, the next morning, at his own house, explained to two of his neighbors how the accident happened, and said to them "that it was his own fault and nobody else's, that he did not blame any of the boat people," and stated the circumstances of the accident in the same way as the defendant's witnesses.

Upon the comparative weight to be given to the statements made by the plaintiff shortly after the injury, and to his testimony at the trial, the judge instructed the jury as follows: "It may, at first, seem surprising that a man who himself wears the shoe should not be able to tell where it pinches; that a man who has his foot crushed should not necessarily know better than any other party where it was hurt, and how it was hurt; and yet it is not an uncommon thing for other men who saw the thing done, to be able to tell better than the man himself how the accident happened. The shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place, so if you find the man at different times making somewhat different statements it does not at all follow that it was his intention to mislead. You are, therefore, to look at any difference of statements that he may have made, if you believe he did make different statements, in that point of view. He may not be the best witness as to what did happen to himself or the manner in which the thing may have happened."

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The defendant excepted to this instruction, and contended that it invaded the province of the jury to determine the credit to be given to the plaintiff's various and contradictory statements, by directing them to look at the evidence in a particular point of view, and by treating the shock and pain of the injury as affecting not only his statements made the same evening, but also those made to his neighbors the next morning.

But the instruction, fairly construed, after calling the attention of the jury to two distinct considerations, the one, the effect of the shock and pain, (which could not have been understood to apply to statements made after the shock and pain had subsided,) and the other, that the making of different statements at different times did not necessarily imply an intention to mislead, suggested to the jury to look at any difference in the plaintiff's statements in that point of view. This was clearly within the judge's authority and discretion in aiding the jury to perform their duty.

The court gave the following instruction: "If the jury believe from the evidence that the wharf in question was an ordinarily strong and good one, and suitable for the purpose for which it was constructed, and that in making the landing in question the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring, this would be *prima facie* evidence of negligence on the part of the agents of defendant under the circumstances in making such landing, and would justify the jury in so finding, unless upon the whole evidence such *prima facie* evidence is rebutted." The defendant excepted to this instruction.

The court did not, in this or any other instruction, tell the jury that the burden of proof on the issue of the defendant's negligence was shifted upon the defendant. On the contrary, the jury were afterwards expressly instructed: "The plaintiff's whole ground of recovery is that the defendant was guilty of negligence. The burden of proof is on the plaintiff to sustain this allegation." The whole effect of the instruction in question, as applied to the case before the jury, was that if the steamboat, on a calm day and in smooth water, was thrown

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with such force against a wharf properly built, as to tear up some of the planks of the flooring, this would be *prima facie* evidence of negligence on the part of the defendant's agents in making the landing, unless upon the whole evidence in the case this *prima facie* evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was *prima facie*, and; if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed. *Stokes* v. *Saltonstall*, 13 Pet. 181; *Transportation Co.* v. *Downer*, 11 Wall. 129, 134; *Railroad Co.* v. *Pollard*, 22 Wall. 341; *Le Barron* v. *East Boston Ferry*, 11 Allen, 312, 317; *Feital* v. *Middlesex Railroad*, 109 Mass. 398; *Rose* v. *Stephens & Condit Co.*, 11 Fed. Rep. 438.

In the same connection, the jury were instructed as follows: "In determining whether the defendant's agents were guilty of negligence in making the landing in question, it would be proper for the jury to consider with the other facts and circumstances shown in evidence whether, under all the circumstances, it was dangerous to make a rear landing with that boat at that time at the wharf in question, and whether either the pilot or captain should not have been in the pilot-house during the making of said landing, and if they find from all the evidence that it was dangerous to make such landing under such circumstances this will be *prima facie* evidence of negligence on the part of defendant to justify them in so finding, unless such evidence is rebutted by the whole evidence in the cause."

The exception to this instruction is equally unfounded. There can be no doubt that approaching a wharf with a steamboat in such a manner, and with such want of supervision, as to be dangerous, is, of itself, evidence of negligence on the part of those in charge of her.

The court, at the defendant's own request, gave the following instructions to the jury:

"If the jury find from the whole evidence that the injuries described in the plaintiff's declaration were caused by the neg

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ligence or carelessness of plaintiff, the plaintiff is not entitled to recover in this action, although they shall further find that in landing at or departing from the pier called Shamrock at the time described in the declaration the defendant's boat was not managed by the defendant's servants with skill and care."

"If from the whole evidence the jury are unable to determine whether the injuries complained of in the plaintiff's declaration were caused by the negligence of plaintiff, or by the negligence of defendant's servants, the verdict of the jury must be for the defendant."

The court also instructed the jury as follows: "If you find the defendant was not guilty of negligence, that ends the case. If you find that the defendant was guilty of negligence, then a second point of inquiry arises, whether the plaintiff was also guilty of negligence and whether his negligence contributed to the injury. If you find that the plaintiff was guilty of negligence, and that such negligence directly contributed to the injury, then it is not important to inquire how far such negligence contributed to it; for if he contributed to it at all, that would incapacitate the plaintiff from recovering."

The defendant requested the court to give this instruction: "If the jury shall find from the whole evidence that, at the time the defendant's boat was landing at the pier Shamrock, the plaintiff negligently or carelessly placed his left foot between the piles of said pier, or between the piles and the flooring of said pier, or between one of the piles in front of said pier and the flooring thereof, and allowed it to remain there while the boat was departing from said pier, and the foot so placed was injured while in that position, then the plaintiff is not entitled to recover in this action."

The defendant also requested the court to give the same instruction modified by omitting the words "negligently or carelessly."

The court declined to do so, and gave the instruction with those words, and added: "This is upon the hypothesis that you shall first find the facts spoken of and then that the plaintiff negligently or carelessly placed his foot in the position referred to. It, however, *still leaves with you the question,*

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if you should find he did place his foot in such position, whether or not his act in doing that was such negligence as would disentitle him from recovering. There is a principle which you will bear in mind in regard to that. It is this: That a person in the position of the plaintiff is to keep his wits about him, to be on the alert so as not to be injured, and to exercise such vigilance or care as is proportionate to the hazard of the duty in which he is engaged. For instance, a man should be more cautious if he is running a dangerous engine than if he is sitting, as you are now, in a position of safety and attending to his usual avocation. His care must be in proportion to the hazard of his engagement. *There is no proof here to show that this was a dangerous vocation* — standing there attending to that wharf — and yet, nevertheless, there were certain hazards accompanying it, just as there are in almost all positions."

To the refusal to give the modified instruction requested, and to so much of the instructions as is above printed in italics, the defendant excepted.

The court rightly refused to omit the words "negligently or carelessly," as requested, because to do so would be to assume that the plaintiff's placing his foot between timbers of the wharf and keeping it there while the steamboat was leaving was necessarily negligence, as matter of law. The court truly said there was no proof in the case that "standing there, attending to that wharf, was a dangerous vocation;" and properly submitted to the jury upon the whole evidence the question whether the plaintiff exercised due care at the time and place of the injury, and under the circumstances attending it. The phrase, "such negligence as would disentitle him from recovering," was evidently used as synonymous with "such negligence as contributed to the injury."

Only two other instructions given by the judge and excepted to by the defendant require to be particularly noticed.

The one, "The burden of proof is, however, upon the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury," was in accord with the uniform course of decision in this court. *Railroad Co.* v.

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Gladmon, 15 Wall. 401; *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Hough* v. *Railway Co.*, 100 U. S. 213; *Northern Pacific Railroad* v. *Mares*, 123 U. S. 710, 720, 721.

The other instruction was in these words: "There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial. *Radley* v. *London & Northwestern Railway*, 1 App. Cas. 754; *Scott* v. *Dublin & Wicklow Railway*, 11 Irish Com. Law, 377; *Austin* v. *New Jersey Steamboat Co.*, 43 N. Y. 75, 82; *Lucas* v. *Taunton & New Bedford Railroad*, 6 Gray, 64, 72; *Northern Central Railway* v. *Price*, 29 Maryland, 420. See also *Williamson* v. *Barrett*, 13 How. 101, 109.

It was argued that this instruction was inapplicable, because there was no evidence that the defendant knew the peril of the plaintiff, or had either time or opportunity, by the exercise of any degree of care, to guard against it; that if his negligence consisted in standing in a dangerous position too near the edge of the wharf, the defendant was not bound to anticipate his remaining in that position; but that his negligence in fact consisted in placing his foot between the flooring and a fender pile, which the defendant could not have been aware of or guarded against.

It is true that the instruction could not apply, and therefore could not be understood by the jury to apply, to the latter alternative. But upon the question of the plaintiff's position and attitude the evidence was conflicting; and it was

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indisputable that the steamboat was approaching the wharf at his call, and for the purpose of receiving freight from his hands, and that her pilot and officers saw him as he waited on the wharf. The jury might well be of opinion that while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct and efficient cause of the injury.

Upon careful consideration of all the instructions given to the jury, we are of opinion that they were applicable to the evidence introduced; that they fully covered the instructions requested; and that they contained nothing of which the defendant has a right to complain.

A single question of evidence remains to be considered. A witness called by the defendant, testified that he had had about twelve years' experience in navigating the Potomac River, as wheelman, first mate, second mate, pilot and captain, but had never been at this wharf. He was asked "if, in his judgment, a position within two or three feet from the fender piles of a wharf constructed like the Shamrock pier was a reasonably safe place for a wharfinger to stand when a boat was approaching in order to take off freight or to make a landing?" Objection was taken to this question by the plaintiff's counsel, and sustained by the court, because the witness had not shown himself to be a wharfinger; and the defendant excepted.

The ground of the exclusion of the question appears to have been that the judge was not satisfied of the qualifications of the witness as an expert upon the subject inquired of. Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive unless clearly erroneous as matter of law. *Spring Co.* v. *Edgar*, 99 U. S. 645; *Stillwell & Bierce Co.* v. *Phelps*, 130 U. S. 520; *Montana Railway* v. *Warren*, 137 U. S. 348. But

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in this case, independently of any such consideration, the question whether the place where the plaintiff stood on the wharf was reasonably safe was one of the questions to be determined by the jury, depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which therefore no opinions of witnesses were admissible. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469; *White* v. *Ballou*, 8 Allen, 408; *Simmons* v. *New Bedford Steamboat Co.*, 97 Mass. 361.

Judgment affirmed.

SELMA, ROME AND DALTON RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 12. Argued March 25, 26, 1891. — Decided April 6, 1891.

In an action against the United States to recover for amounts due certain mail contractors under the appropriation in the sundry civil appropriation act of March 3, 1877, 19 Stat. 362, c. 105, which provided that "any such claims which have been paid by the Confederate States government shall not again be paid;" the burden of proof is on the plaintiff to show that his claim was not of the excepted class.

Whether, that appropriation having been covered into the Treasury, a claimant can maintain suit under that act in the Court of Claims without further legislation, is a question which the court has not deemed it necessary to consider.

APPEAL from the Court of Claims where the judgment was against the claimant. The case is stated in the opinion.

Mr. George A. King for appellant.

Mr. Assistant Attorney General Cotton for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff, the Selma, Rome and Dalton Railroad Company, seeks in this action to recover the sum of $5915.80, which

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is alleged to be the balance due on a written contract executed July 10th, 1858, between the United States and the Alabama and Tennessee Rivers Railroad Company, an Alabama corporation, whereby that corporation was to receive for transporting the mail between Selma and Taladega, in that State, the sum of $12,000 per year, payable quarterly, for the term commencing July 1, 1858, and ending May 31st, 1862. By that contract the Postmaster General was authorized to dispense with the service entirely, if required by the public interest, allowing one month's extra pay upon the amount deducted. The United States disputes its liability to the plaintiff in any sum whatever.

The Alabama and Tennessee Rivers Railroad Company performed the services required by the above contract up to the 31st of May, 1861, on which day the mail service on its road was discontinued by the Postmaster General of the United States; and such service passed, on and after June 1, 1861, under the direct control of, and was performed by the railroad company for the Confederate government.

By an act of the Confederate Congress, approved August 30, 1861, entitled "An act to collect for distribution the moneys remaining in the several post offices of the Confederate States at the time the postal service was taken in charge by said government," it was provided:

"§ 1. That it shall be the duty of the Postmaster General to collect all moneys due from the several postmasters within the Confederate States, and which they had not paid over at the time the Confederate States took the charge of the postal service, and the several postmasters are hereby required to account to the general post office of this government under the same rules, regulations and penalties that were prescribed by the law under which said moneys were received.

"§ 2. The moneys so received shall be kept separate and distinct from the other funds of the Post Office Department, and shall constitute a fund for the *pro rata* payment of claims for postal service which accrued before the Postmaster General took charge of the postal service in the States respectively comprising this Confederacy, as may hereafter be provided.

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"§ 3. It shall be the duty of the Postmaster General to make proclamation that all persons who are citizens of the Confederate States of America, and who may have rendered postal service in any of the States of this Confederacy, under contracts or appointments made by the United States government before the Confederate States government took charge of such service, shall present their claims to this department, verified and established according to such rules as he shall prescribe, by a time therein to be set forth, not less than six months, and requiring the claimant to state, under oath, how much has been [paid] and the date of such payments, on account of the contract or appointment under which said claim occurred, and what fund or provision has been set apart or made for the further payment of the whole or any portion of the balance of such claim by the government of the United States, or of any of the States; and they shall also state, on oath, whether they performed fully the service according to their contracts or appointments during the time for which they claim pay, and if not, what partial service they did perform, and what deductions have been made from their pay, so far as they know, on account of any failure, or partial failure, to perform such service; and the Postmaster General shall, as soon as he shall have collected such moneys from said postmasters, and ascertained the amount of claims against the Post Office Department and the amount received respectively by the claimants as aforesaid, and the provisions, if any, for future payment, make a report of the same, so that future action may be taken thereon as respects the distribution.

"§ 4. All claims for postal service required to be presented by this bill shall be barred as against this fund, unless presented within six months after the proclamation of the Postmaster General shall have been made."

By another act of the Confederate Congress, approved September 27, 1862, entitled "An act to provide for the payment of sums ascertained to be due for postal service to citizens of the Confederate States by the Postmaster General," it was provided: "The Congress of the Confederate States of America do enact, That the Postmaster General of the Confederate

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States do proceed to pay to the several persons, or their lawfully authorized agents or representatives, the sums respectively found due and owing to them for postal service rendered in any of the States of this Confederacy, under contracts or appointments made by the United States government before the Confederate States government took charge of such service, as the said sums have been audited and ascertained by him under the provisions of an act entitled 'An Act to collect for distribution the moneys remaining in the several post offices of the Confederate States at the time the postal service was taken in charge by said government,' approved the 30th of August, 1861; but the sums authorized by this act to be paid are only the balances found due after all proper deductions shall have been made on account of previous payments made by the United States, or any of the States, or of available provisions made in whole or in part for such payment by said government, or of any of the States, and after making all proper deductions for failures or partial failures to perform the service according to their several contracts or appointments during the time for which they claim pay: *Provided*, That the provisions of this act shall only extend to loyal citizens of the Confederate States."

The Congress of the United States, by joint resolution, passed March 2, 1867, prohibited the payment of any account, claim or demand against the government to any person not known to have been opposed to the rebellion and in favor of its suppression. 14 Stat. 571. This resolution was carried forward into section 3480 of the Revised Statutes, which provides: "It shall be unlawful for any officer to pay any account, claim or demand against the United States which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged or in any manner sustained the late rebellion, or in favor of any person who during such rebellion was not known to be opposed thereto, and distinctly in favor of its suppression; and no pardon heretofore granted, or hereafter to be granted, shall authorize the payment of such account, claim or demand, until this section is modified or repealed. But this section

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shall not be construed to prohibit the payment of claims founded upon contracts made by any of the departments, where such claims were assigned or contracted to be assigned prior to the first day of April, 1861, to the creditors of such contractors, loyal citizens of loyal States, in payment of debts incurred prior to the first day of March, 1861."

By an act of the legislature of Alabama, approved February 8, 1867, the consolidation of the Dalton and Jacksonville Railroad Company and the Georgia and Alabama Railroad Company, corporations of Georgia, with the Alabama and Tennessee Rivers Railroad Company, under the name of the Selma, Rome and Dalton Railroad Company, was ratified, and the consolidated company invested with all the rights, functions, powers and privileges of the Alabama and Tennessee Rivers Railroad Company.

The petition alleges that neither the plaintiff nor any one for it ever received payment for services rendered under the above contract, during the period from January 1, 1861, to May 31, 1861, inclusive, except a small amount (found by the court below to be $95.19) or any compensation for the discontinuance of that contract. For the reasons set forth in the opinion of the Court of Claims in *Blount, Adm'r,* v. *United States*, 21 C. Cl. 274, this action was dismissed.

The present suit is based upon a clause in the act of Congress, approved March 3, 1877, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1878. 19 Stat. 344, 362, c. 105. No right is asserted to recover independently of that act. The clause in question provides: "That the sum of three hundred and seventy-five thousand dollars, or so much thereof as may be necessary, be appropriated to pay the amount due to mail contractors for mail service performed in the States of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Texas, Tennessee, Virginia and West Virginia in the years eighteen hundred and fifty-nine, eighteen hundred and sixty, eighteen hundred and sixty-one, and before said States respectively engaged in war against the United States; and the provisions

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of [section] three thousand four hundred and eighty of Revised Statutes of the United States shall not be applicable to the payments therein authorized: *Provided*, That any such claims which have been paid by the Confederate States government shall not again be paid."

We have seen that by the act of the Confederate Congress of August 30th, 1861, provision was made for the collection from postmasters within the Confederate States of all moneys due from them and not paid over to the United States at the time the insurrectionary government took charge of the postal service within the territory subject to its control; the sums so collected to constitute a separate and distinct fund for the *pro rata* payment of claims against the United States for postal service accruing before the control of that service was assumed by the Confederate States. And, by the Confederate enactment of September 27, 1862, the moneys so collected were directed to be used in paying "to loyal citizens of the Confederate States" having unpaid claims for postal services rendered in any of the Confederate States "under contracts or appointments made by the United States government before the Confederate States government took charge of such service." It is not disputed that the claim here in suit is of the class for the payment of which the Confederate enactment of 1862 made provision. It is stated in *Blount, Adm'r*, v. *United States*, 21 C. Cl. 274, 279, that $502,017.19 were paid out by the Confederate government, under the above acts of 1861 and 1862, but to whom did not appear. In the present case no such fact appears. Nor does it appear by direct, positive proof in this case that any claims of that character were ever paid by the Confederate government to any one.

It is, however, contended by the United States that the act of March 3, 1877, embraces only claims that appear not to have been paid by the Confederate government. The contention of the plaintiff is that it is entitled to judgment, by force of that act, upon proof of services rendered by it, unless the United States shows, affirmatively, that its claim was paid by the Confederate States government. These contentions rest

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upon radically different interpretations of the act of 1877. We are of opinion that Congress intended to provide for the payment of only such claims as appeared not to have been paid by the Confederate government. As the claims described in that act had been, at the date of its passage, outlawed by limitation or by express enactment forbidding their payment, and as Congress must be presumed to have passed that act with knowledge of the Confederate legislation of 1861 and 1862, we cannot believe that it was intended to impose upon the United States the burden of showing, affirmatively, that such claims had been paid by the Confederate government. The object of the proviso, "that any such claims which have been paid by the Confederate States government shall not again be paid," was to indicate the class of cases which the act embraced. One of the objects of a proviso is to qualify or restrain the generality of the enacting clause, "or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview." *Minis* v. *United States*, 15 Pet. 423, 445. If Congress had simply declared — without embodying the declaration in a "proviso" — that all claims of the kind described, not previously paid by the Confederate government, should be recognized and paid, it would never occur to any one that the United States assumed the burden of showing that such claims had been thus paid. The act of 1877 was, in effect, an invitation to all having claims of the class described in it, which had not been paid by the Confederate States, to present them for payment out of the sum appropriated by it for that purpose, leaving those seeking the benefit of the act to show that their claims were of that class. Besides, as the fact of payment or non-payment by the Confederate government was peculiarly within the knowledge of the claimant or within his power — if in the power of any one — to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the act of 1877 provided. But there was no proof on the subject by the plaintiff, nor does it appear, if that fact were material, that such proof

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was impossible. It prepared the case and went to a hearing upon the theory that it was entitled to judgment, upon proof simply of the services rendered, unless the United States showed that the claim in suit had been, in fact, paid by the Confederate government. We cannot accept that interpretation of the act.

If, however, the burden of proof was on the United States to show that the plaintiff's claim had been paid by the Confederate government, it would not follow that the plaintiff is entitled to judgment. Proof of the Confederate legislation of 1861 and 1862, under which "loyal citizens of the Confederate States" were assured of payment out of moneys belonging to the United States, and in the hands of its appointees, at the time the Confederate government assumed control of the postal service within the country over which it exercised authority — which moneys the Confederate government undertook to collect for distribution among those loyal to it — in connection with the fact that, when the Confederate acts of 1861 and 1862 were passed, the plaintiff was carrying the mail for the Confederate government, and, therefore, was in a position to enjoy the benefit of its legislation, made a *prima facie* case which required the plaintiff to disclose such facts as were peculiarly within its knowledge, and thereby make some showing that its claim had not been paid; a fact negative in form, but capable of proof affirmative in its nature by the party who knew, or could easily ascertain, the truth of the case. While the general rule is that the burden of proof is where the pleadings place it, namely, upon the party against whom judgment must go, if no evidence whatever is introduced, its application is often affected by circumstances. "From the very nature of the question in dispute," says Mr. Best, "all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be produc-

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tive of expense and delay. In order to prevent this, it has been established as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant." Principles of Evidence, § 274; 1 Greenl. Ev. § 79; Starkie Ev. 589. The books of account kept by the Alabama and Tennessee Rivers Railroad Company, or some one connected with that corporation while it was serving the Confederate government, might throw light upon the question of payment. The presumption is that the plaintiff has possession of those books, and that, in connection with the evidence of those who kept them, they would disclose whether the original contractor had or had not been paid by the Confederate government out of the moneys of the United States which it appropriated. It did not produce them. And there is no finding inconsistent with the presumption that it was entirely within its power to show, if such were the fact, that its claim had not been paid by the Confederate government. So that the reasonable inference from the facts found — assuming that the burden of proof was upon the United States — is, that the plaintiff's claim was not of the class for the payment of which Congress legislated in 1877.

It appears from the finding of facts that shortly after the passage of the act of 1877 the Secretary of the Treasury issued an order that no payments be made out of the appropriation of $375,000 until all claims covered by the terms of the act should be received and adjusted, and that if the appropriation proved to be insufficient to pay all so adjusted, they should be paid *pro rata*. In consequence of that order no claims were adjusted within two years after the date of that act, and the appropriation was covered into the Treasury under the requirement of the fifth section of the legislative, executive and judicial appropriation act of June 20, 1874. 18 Stat. 85, c. 328. Whether, under these circumstances, a claimant under the act of 1877 could maintain a suit in the Court of Claims against the United States, without further legislation by Congress, or without a new appropriation, is a question which, in view of the disposition of the case upon other grounds, we have not deemed it necessary to consider. *Judgment affirmed.*

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INTERSTATE LAND COMPANY v. MAXWELL LAND GRANT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 1267. Argued March 10, 1891. – Decided April 6, 1891.

A demurrer admits facts well pleaded, but does not admit that the construction of a written instrument set forth in the bill is the true one, or that its legal effect is contrary to that which its language imports.

Questions affecting the validity of the Maxwell land grant, as to the authority of the Mexican government to make it, are no longer open; and a party claiming the same land under a prior grant from the Mexican government must, to succeed in his claim, recover on the strength of his own title.

An *empresario* grant of land in Mexico operated to designate a tract of country within which the *empresarios* might establish a colony or colonies; but no title to any land passed to them until such colony was established.

United States v. *Arredondo*, 6 Pet. 691, and *Gonzales* v. *Ross*, 120 U. S. 605, distinguished from this case.

IN EQUITY. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. Alexander Graves (with whom were *Mr. William Warner* and *Mr. John L. Jerome* on the brief) for appellant.

Mr. Frank Springer for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is a suit in equity, brought by the Interstate Land Company, a Colorado corporation, against the Maxwell Land Grant Company, a corporation organized under the laws of the Kingdom of the Netherlands, and doing business in Colorado, pursuant to the laws of that State, to establish its title to a large tract of land in Las Animas County, Colorado, for which the defendant has a United States patent, and to restrain the defendant from prosecuting certain suits in ejectment against

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various parties who are tenants of the plaintiff. A demurrer to the original bill was sustained by the court below presided over by Mr. Justice Brewer, then Circuit Judge, his opinion being reported in 41 Fed. Rep. 275. The plaintiff then amended its bill in some particulars, and the defendant again demurred. The demurrer was sustained, and the plaintiff declining to further amend, the bill was dismissed. From that decree an appeal was prosecuted to this court.

The case as made by the pleadings on the demurrer is as follows: The lands in dispute are part of the tract embraced in the patent to Charles Beaubien and Guadalupe Miranda, dated May 19, 1879, for what is known as the "Maxwell Land Grant," in New Mexico and Colorado, the validity of which was assailed by the United States in the *Maxwell Land Grant Case*, 121 U. S. 325, and *S. C.*, on petition for rehearing, 122 U. S. 365. In that case it was held, among other things, after elaborate argument of counsel and upon a most thorough and careful examination by the court of all the points involved, that the grant by the Republic of Mexico, in 1841, to Beaubien and Miranda, as confirmed by the act of Congress of June 21, 1860, the title of which had passed to the Maxwell Land Grant Company (the defendant in this case) by various mesne conveyances, was a valid grant; and that the survey and the patent issued upon it, as well as the original grant, were entirely free from any fraud on the part of the grantees or those claiming under them. The decision of the court in that case is not now assailed; but the contention is, substantially, that the confirmation and patenting of the grant to Beaubien and Miranda operated merely as a quit-claim of the United States to whatever rights of property the government acquired from Mexico by the treaty of Guadalupe Hidalgo, and did not, in any manner, affect claims to the same land derived from the Republic of Mexico, which antedated the original grant to Beaubien and Miranda.

The claim of the plaintiff here rests upon an alleged *empresario* grant to John Charles Beales and José Manuel Royuela, in 1832, by the government of Coahuila and Texas, then two Mexican States under one provincial administration. What-

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ever rights to the lands in dispute were acquired by the original *empresarios*, or colonizing contractors, have passed to the plaintiff under various mesne conveyances. The petition of the *empresarios* and the acceptance of their proposition by the Mexican authorities, which together constitute the basis of plaintiff's claim, are as follows:

"Petition and grants to José Manuel Royuela and John Charles Beales for the years one thousand eight hundred and thirty-two and thirty-three.

"To his excellency the governor of the State of Coahuila and Texas.

"SIR: The citizen José Manuel Royuela, a native of Saltillo, and there married, and John Charles Beales, a native of England settled in Mexico, and there married to a Mexican subject, having children, with all due respect represent to your excellency,

"That, being very desirous of augmenting the population, wealth and power of the Mexican nation, and at the same time of affording to a certain number of virtuous and industrious families the means of acquiring an honorable subsistence by cultivating a tract of land in the ancient province of Texas, and being, moreover, acquainted in full with the law of colonization passed by the honorable legislature of this State on the twenty-fourth of March, one thousand eight hundred and twenty-five, by which '*empresarios*' or colonizing contractors are allowed to undertake to colonize under the conditions and stipulations by said law prescribed, and being anxious to form an establishment that may be useful to a new colony and at the same time beneficial to the State on account of the advantages to accrue thereout,

"We pray your excellency to accept us as such '*empresarios*' or colonizing contractors, and to permit us to introduce into this State, within the time that may be stipulated, two hundred Catholic families, of moral and industrious habits, and for that object your excellency will be pleased to grant us the tract of land included within the following limits, viz: Begin-

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ning at a landmark set up on a spot whereat the thirty-second degree of north latitude is crossed by the meridian of the hundred and second degree of longitude west from London, said spot being at the southwest corner of the grant petitioned for by Col. Reuben Ross; from thence proceeding west along the parallel of the thirty-second degree of latitude as far as the eastern boundary of New Mexico; from thence running north on the boundary line between the provinces of Coahuila and Texas and New Mexico as far as twenty leagues of the river Arkansas; from thence east to the meridian of the hundred and second degree of longitude, which is the western boundary of the grant petitioned for by said Col. Reuben Ross, and from thence proceeding south as far as the place of beginning.

"Your petitioners, as '*empresarios*,' pray for this grant on the same conditions that it was formerly given to the late Stephen Julian Wilson, whose term of six years is about to expire, on the twenty-sixth of May in this year, without the conditions of the grant having been fulfilled, in consequence of the grantee. Besides the conditions which are required by the colonization law of the State the *empresarios* and their settlers agree to observe the constitution of the Mexican nation and the private constitution of this State as well as the general and local laws that have been or shall be hereafter promulgated. They further bind themselves to comply with the conditions on which this petition is granted, and to take up arms in defence of the rights of the nation against the savage Indians or any other enemies that may attack the country or in any manner [seek] to alter its form of government or to disturb the public tranquillity; and, finally, to prevent the inhabitants of the United States of North America from trading with the said Indians and providing them with arms and ammunition in exchange for horses and mules.

"Wherefore, we pray your excellency to be pleased to grant this respectful petition, which we shall consider as a favor conferred on us.

"Dated at Saltillo, the thirteenth of March, one thousand eight hundred and thirty-two.

(Signed) "José Manuel Royueda.
"John Charles Beales."

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"*Conditions of the Grant.*

"Terms on which the supreme government of the State accepts the proposal of the citizens José Manuel Royuela and John Charles Beales for colonizing certain land with two hundred foreign families, such as are not excepted by the law of the sixth of April, one thousand eight hundred and thirty.

"ARTICLE 1. The government accepts the proposal made in the foregoing petition, as far as it is conformable with the law of colonization passed by the honorable Congress of the State on the twenty-fourth of March, one thousand eight hundred and twenty-five, and consequently assigns to the petitioners the tract of land included within the following limits, that they may establish thereon the proposed colony: It shall begin at a landmark which shall be set up on the spot where the parallel of the third-second degree of north latitude crosses the meridian of the hundred and second degree of longitude west from London, said spot being at the southwest corner of the grant petitioned for by Col. Reuben Ross. From thence it shall proceed along the parallel of the thirty-second degree of latitude as far as the eastern limit of New Mexico. From thence it shall ascend north on the boundary line between the provinces of Coahuila and Texas and New Mexico as far as twenty leagues of the river Arkansas. From thence it shall run east to the meridian of the hundred and second degree of longitude, which is the western boundary of the grant petitioned for by the said Col. Reuben Ross; and from thence it shall proceed south as far as the place of beginning.

"ART. 2. Though the boundaries of the tract set forth in the preceding clause are those assigned to Stephen Julian Wilson in a grant passed by this government on the twenty-seventh of May, one thousand eight hundred and twenty-six, yet this circumstance has not been considered an impediment to the entering into the present contract, inasmuch as the time allotted to the said Wilson for the completion of said enterprise will (expire) in the month of May of this present year without his having to this day performed the

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same or any part whatsoever; but if, however, in the short time that has to elapse any number of the families of that *empresario* should present themselves, then and in that case the present grant shall, with due respect to the part or parts performed by the first grantee thereof, be null and void to all intents and purposes.

"ART. 3. In consideration of the grant hereinbefore specified the *empresarios* or contracting parties agree to introduce and settle, on their own account, two hundred foreign families, conforming themselves as well to the general law of the Republic as to the laws of the State in this behalf provided.

"ART. 4. All lands whatsoever held under legal titles that may be included within the limits designated in article first shall be respected by the colonists who shall hold under this contract, and it shall be obligatory on the part of the *empresarios* to see the observance of this clause.

"ART. 5. The State retains to itself the right of property over all the surplus lands which shall remain of this grant after laying off those which belong to the *empresarios* and their settlers according to the laws in that behalf provided.

"ART. 6. In conformity with article 8 of the law on colonization hereinbefore referred to the *empresarios* are bound to introduce the stipulated number of two hundred families within the term of six years, which shall be computed from the date hereof, under the penalty of being debarred from all the privileges and advantages afforded by the said law.

"ART. 7. It shall be obligatory on the *empresarios* not to introduce or suffer to remain in the colony men guilty of atrocious crimes or of bad conduct; as also to endeavor that no person whatsoever shall carry on traffic in arms and ammunition with the barbarous tribes of Indians in exchange for horses and mules.

"ART. 8. Whenever there shall be a sufficient number of men, the national militia shall be duly organized and regulated according to the laws of the State in that respect provided.

"ART. 9. The colony shall be regulated by the person whom this government shall appoint to allot the respective settle-

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ments or possessions, and he shall duly observe the laws on colonization in force throughout the State, the general law of the eighteenth of August, one thousand eight hundred and twenty-four, and likewise the instructions to commissioners which have been appointed by the honorable Congress, taking care to afford protection within the limits of the colony to such persons only as shall be approved of by the said *empresarios*.

"ART. 10. All official communications, instruments and other public documents emanating from the colony must be written in the Spanish language.

"ART. 11. In reference to all matters not provided for or expressed in these articles, the *empresarios* or the new settlers holding under them shall abide and be governed by the federal constitution and the laws of this State.

"And his excellency the governor of the State, as also the citizens José Manuel Royuela and John Charles Beales, having agreed in the articles of this contract to grant and bound respectively to the observance and performance thereof, afterwards signed the same before me, the undersigned secretary of this government.

"And having been directed to give the *empresarios* this certified copy of all the documents relating to the grant, that they may serve them as security and as formal title (or as a title in form) thereto, the original will, according to law, remain filed and recorded in the secretary's office under my charge.

"Dated, city of Leona Vicario, the fourteenth day of March, one thousand eight hundred and thirty-two.

(Signed) "JOSÉ MARIA DE LETONA.
"JOHN CHARLES BEALES.
"JOSÉ MANUEL ROYUELA.

"SANTIAGO DEL VALLE, *Secretary*.

"The foregoing is copied from the original documents filed and recorded in the secretary's office under my charge, whence it was ordered taken by his excellency the governor.

"City of Leona Vicario, the fourteenth of March, one thousand eight hundred and thirty-two.

(Signed) "SANTIAGO DEL VALLE, *Secretary*."

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The bill in this case was filed January 20, 1888. After some introductory matters, it set out with much particularity the various proceedings had in the matter of the grant to Beaubien and Miranda, both under the Mexican law and subsequent to the treaty of Guadalupe Hidalgo, by which the territory was acquired by the United States, up to and including the acquisition of the grant by the defendant, substantially as they are detailed in the *Maxwell Land Grant Case*, 121 U. S. 325, and averred that that grant, being an alleged *empresario* grant, was absolutely void, because at the date it was made there was no law of Mexico in existence under which there was any authority for it. It then set out, with equal precision, the various proceedings had in relation to the alleged *empresario* grant to Beales and Royuela, and the various mesne conveyances by which the plaintiff became possessed of it. The amended bill averred that the Mexican government, by sundry and divers official acts, (which are set forth and described,) recognized that Beales and Royuela, by virtue of their *empresario* contract, had the title in fee to the lands in question. It then averred that the plaintiff and its tenants were in the exclusive possession of the premises in dispute, and that the defendant had never been in possession of them. One of the official acts of the Mexican government referred to was said to be the following order made by the President of the Republic of Mexico, dated Mexico, July 12, 1836, addressed to Beales: "His excellency the President *ad interim* has been advised of the judicious and circumspect course which you may have taken in employing your influence to allay the disturbances which have broken out and to sustain order and the obedience due to the general government, and in correcting public opinion through the medium of the newspapers in the United States of the North; and his excellency, being satisfied with this and the like proceedings on your part, which are such as belong to a good citizen, has directed me to return you thanks, as an acknowledgment for the same, and to require that you will continue in the most effectual manner in your power your good offices in defence of the just cause of the nation and to maintain and impress a

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spirit of order and peace upon the inhabitants of the colonial district placed under your charge, and also upon all other persons who may be interested in the benefits which will ensue from a like course of conduct. In consideration of which services afforded to this nation in its present struggle, an order has been issued by this department, at the instance of the general-in-chief, to the army of operation to afford protection to the colonial establishments of yourself and Señor Edgerton, who has concurred in the course of proceedings which you have taken; and his excellency coöperates in the recommendation in his favor as well as yours, in the manner indicated by this communication."

The amended bill then continued as follows: "And the plaintiff further avers that the said Mexican government, in pursuance of said order, did at all times maintain and protect the possession and title of the said Royuela and Beales to the said lands, and continued so to do until the successful revolution of Texas (one of the grantors) rendered it utterly impossible to afford further protection. And the plaintiff further avers and alleges that, in addition to having taken actual possession of the lands embraced in said grant and having sectionized a large part thereof, the said Beales, in further performance of the condition of said grant, had introduced a portion of the families, as required by its terms, and would have introduced all the families of the class described therein, and would have performed all the conditions of the said grant had he not been wholly prevented in such performance by the said revolution of Texas, which resulted in its independence of Mexican authority."

Attached to the bill as exhibits, and made part of it, are copies of the records of the proceedings in the matter of both of the claims in question; and in the consideration of the questions involved herein it will be necessary to refer to some of them somewhat more in detail.

The proposition of counsel for appellant that the effect of the demurrer is an admission *pro hac vice* that the Interstate Land Company has the title in fee to the lands in dispute needs only the single reply that a demurrer admits facts well

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pleaded, but does not admit that the construction of a written instrument set forth in the bill is the true one, or that its legal effect is contrary to that which its language imports. The very object of a demurrer in such case is to submit the question presented by the instrument as a matter of law for the determination of the court. Story's Eq. Pl. (9th Ed.) § 452, note *a*; *Dillon* v. *Barnard*, 21 Wall. 430, 437; *United States* v. *Ames*, 99 U. S. 35, 45.

Passing now to the merits of the controversy, the first question to be disposed of relates to the patented grant of the defendant. We have already stated that, in the *Maxwell Land Grant Case*, it was held that the grant to Beaubien and Miranda, which is the foundation of the defendant's title, was a valid grant, and that the decision of the court in that case is not directly assailed. The effect of the decision in that case, however, is evidently misunderstood by the appellant; for one of the main points urged on this appeal is, that that grant was void *ab initio*, for the reason that, being an alleged *empresario* grant, authority for it must be found in the colonization laws of Mexico, and those laws had been repealed by a law of the Republic passed in 1837, four years prior to the date of that grant. It becomes necessary, therefore, to state with some degree of particularity what was actually decided in that case.

A reference to that decision will show that the validity of the grant was one of the principal questions there considered. As stated in the opinion, the first question presented for consideration was: "Do the colonization laws of Mexico, in force at the time the grant was made to Beaubien and Miranda, namely, the decree of the Mexican Congress of August 18, 1824, and the general rules and regulations for the colonization of the territories of the Republic of Mexico of November 21, 1828, render this grant void, notwithstanding its confirmation by the Congress of the United States?" 121 U. S. 360. The court then discussed that question very fully, and came to the conclusion that the grant certainly partook very largely of the nature of an *empresario* grant, and was evidently so considered by Congress when it was confirmed. Among other

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things, it was found that juridical possession had been given to the original grantees by the alcalde, one Cornelio Vigil, who accompanied the delivery of possession with a diseño or plat showing the boundaries of the tract granted. But the decision was not rested solely upon the fact that the grant was generally understood to be an *empresario* grant, but upon the proposition that the action of Congress in confirming it as made to Beaubien and Miranda, and as reported for confirmation by the suveyor general of New Mexico, without any qualification or limitation as to its extent, was conclusive upon the court. In this connection the court said, (pp. 365–6:) "But whether, as a matter of fact, this was a grant, not limited in quantity, by the Mexican decree of 1824, or whether it was a grant which in strict law would have been held by the Mexican government, if it had continued in the ownership of the property, to have been subject to that limitation, it is not necessary to decide at this time. By the treaty of Guadalupe Hidalgo, under which the United States acquired the right of property in all the public lands of that portion of New Mexico which was ceded to this country, it became its right, it had the authority, and it engaged itself by that treaty to confirm valid Mexican grants. If, therefore, the great surplus which it is claimed was conveyed by its patent to Beaubien and Miranda was the property of the United States, and Congress acting in its sovereign capacity upon the question of the validity of the grant, chose to treat it as valid for the boundaries given to it by the Mexican governor, it is not for the judicial department of this government to controvert their power to do so;" citing *Tameling* v. *United States Freehold &c. Co.*, 93 U. S. 644.

Afterwards it was said: "At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this

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action of Congress. Certainly the power of the courts can go no further than to make a construction of what Congress intended to do by the act, which we have already considered, confirming this grant and others." 121 U. S. 382.

We conclude, therefore, that questions affecting the validity of that grant, that is, as to the authority of the Mexican government to make it, are no longer open. The action of Congress in confirming it and the subsequent proceedings in the Land Department, together with the proceedings in the courts to set aside the patent, have certainly settled those questions forever. True, those proceedings do not estop a party claiming the same land under a prior grant from the Mexican government. But, to succeed in his claim, he must recover on the strength of his own title. In other words, he must establish the validity of his own grant in order to defeat a subsequent grant which has been adjudged valid in proper legal proceedings. The confirmation and patenting of the grant to Beaubien and Miranda operated to divest the United States of all their rights to the land embraced in the grant which this country acquired from Mexico by the treaty of Guadalupe Hidalgo. And the only way that that grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican government to some other person.

This leads naturally to the consideration of the nature and extent of the grant to Royuela and Beales in 1832, which is the foundation of the appellant's title. On the one hand it is contended that the contract of the States of Coahuila and Texas with the *empresarios* operated as a grant of the fee to the contractors of all the land described in the instruments of title, subject to be defeated only by the failure of the *empresarios* to perform the conditions subsequent of the grant; that the performance of those conditions became impossible by reason of the fact that one of the grantor States engaged in open war with the Republic of Mexico, and achieved its independence prior to the time within which such performance was required; and that the grant was thereby relieved of those conditions and became absolute. The tract thus claimed

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embraces about 60,000,000 acres. On the part of the defendant it is insisted that the conditions of the grant were precedent, and that, therefore, no title passed to the contractors until those conditions were performed; and that, in no event, under the contract, could the *empresarios* have aquired a title to the whole body of land described, even if all the conditions had been performed. In other words, it is said that the grant in question operated simply to designate a large tract of country within which the *empresarios* might establish a colony or colonies; that no title to any land passed to them until such colony was established; that if a colony was established, the colonists were to be supplied with land taken from this large body of land; that the amount of lands to which the *empresarios* would be entitled, upon the establishment of a colony, was to be determined by the number of families introduced by them, and must also be taken from this large body of land; and that, of necessity, those premium lands, of the contractors, as they were called, must be of a less quantity than the grant as designated by its outboundaries.

The Circuit Court adopted, substantially, the views of the defendant. In this we think the court was correct. In fact, the opinion of the learned judge who presided on the hearing of the case, is a comprehensive and exhaustive review of the case, as presented by the original bill and demurrer, and leaves little to be said on the questions then presented. A few observations, we think, will demonstrate the correctness of that conclusion. In construing the instruments of title, reference must be had to all parts of them. The mere fact that the word "grant" is used many times in them, sometimes apparently in its general and unrestricted sense of a conveyance of the title, ought not to be permitted to outweigh other parts of the instruments which clearly negative that idea. Referring to the first article of the "conditions of the grant," its language is found to be as follows: "The government accepts the proposal made in the foregoing petition as far as it is conformable with the laws of colonization passed by the honorable Congress of the State on the twenty-fourth of March, one thousand eight hundred and twenty-five, and consequently

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assigns to the petitioners the tract of land included within the following limits, that they may establish thereon the proposed colony," etc. As was well remarked by Judge Brewer, this article "may be considered as most nearly like the granting clause in an ordinary deed." Now, does it in any sense purport to convey the fee in the lands specified to the *empresarios?* We think not. The government "assigns" to the contractors the tract of land described. But did it do so *absolutely?* Certainly not; but for a particular purpose, viz. the establishment thereon of a colony. The establishment of a colony was the consideration for the assignment. And if, as is contended, the *empresarios* thereby became possessed of the fee to that vast region of country, where were the colonists provided for? Where were they to get lands? An answer to those questions shows at once the fallacy of the appellant's position. Again, that idea is wholly inconsistent with article 5, which provides that "the State retains to itself the right of property over all the surplus lands which shall remain of this grant, after laying off those which belong to the *empresarios* and their settlers, according to the laws in that behalf provided." How could there be any *surplus* lands if the *empresarios* got all of them? That section, if it means anything at all, clearly negatives the appellant's contention, and is in complete harmony with the law of 1825 to which we shall presently refer.

But furthermore, the proposition of the petitioners was accepted, and the assignment was made "as far as it is (was) conformable with the laws of colonization passed by the honorable Congress of the State on the 24th of March, 1825." To ascertain with precision the meaning of the contract, its terms must be read in the light of that act. It is found in Rockwell's Spanish and Mexican Law, p. 641, and consists of 48 articles. The articles bearing particularly upon the question under consideration are as follows:

"ART. 8. The projects for new settlements in which one or more persons offer to bring at their expense, one hundred or more families, shall be presented to the government, and if found conformable with this law, they will be admitted; and

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the government will immediately designate to the contractors, the land where they are to establish themselves, and the term of six years, within which they must present the number of families they contracted for, under the penalty of losing the rights and privileges offered in their favor, in proportion to the number of families which they fail to introduce, and the contract totally annulled if they do not bring, at least, one hundred families.

"ART. 9. Contracts made by the contractors or undertakers, *empresarios* with families brought at their expense, are guaranteed by this law so far as they are conformable with its provisions.

"ART. 10. In the distribution of lands, a preference shall be given to the military entitled to them, by the diplomas issued by the supreme executive power, and to Mexican citizens who are not military, among whom there shall be no other distinction than that founded on their individual merit, or services performed for the country, or in equal circumstances, a residence in the place where the land may be situated; the quantity of land which may be granted is designated in the following articles.

"ART. 11. A square of land, which on one side has one league or five thousand varas, or what is the same thing, a superficie of twenty-five million varas, shall be called a sitio, and this shall be the unity for counting one, two or more sitios; and also the unity for counting one, two or more labors, shall be one million square varas or one thousand on each side, which shall compose a labor. The vara for this measurement shall be three geometrical feet.

"ART. 12. Taking the above unity as a basis and observing the distinction which must be made, between grazing land, or that which is proper for raising of stock, and farming land, without the facility of irrigation this law grants to the contractor or contractors, for the establishment of a new settlement, for each hundred families, which he may introduce and establish in the State, five sitios of grazing land, and five labors at least, the one-half of which shall be without the facility of irrigation; but they can only receive this pre-

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mium for eight hundred families, although a greater number should be introduced, and no fraction whatever less than one hundred shall entitle them to any premium, not even proportionally.

"ART. 13. Should any contractor or contractors in virtue of the number of families which he may have introduced, acquire in conformity with the last article, more than eleven square leagues of land, it shall nevertheless be granted, but subject to the condition of alienating the excess, within twelve years, and if it is not done, the respective political authority shall do it, by selling it at public sale, delivering the proceeds to the owners, after deducting the costs of sale.

"ART. 14. To each family comprehended in a contract, whose sole occupation is cultivation of land, one labor shall be given; should he also be a stock-raiser, grazing land shall be added to complete a sitio, and should his only occupation be raising of stock, he shall only receive a superficie of grazing land, equal to twenty-four million square bars."

The following articles of the "instructions to the commissioners appointed by the legislature of the State" for the partition of the lands among the colonists, under the act of March 24, 1825, found in Rockwell's Spanish and Mexican Law, p. 649, relate to the question at issue:

"ART. 4. He shall issue, in the name of the State, the titles for land, in conformity with the law, and put the new colonists in possession of their lands, with all legal formalities, and the previous citation of adjoining proprietors, should there be any."

"ART. 6. He shall take care that no vacant lands be left between possessions, and in order that the lines of each one may be clearly designated, he shall compel the colonists, within the term of one year, to mark their lines, and to establish fixed and permanent corners.

"ART. 7. He shall appoint under his own responsibility the surveyor, who must survey the land scientifically, requiring him previously to take an oath truly and faithfully to discharge the duties of his office.

"ART. 8. He shall form a manuscript book of paper of the

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third stamp, in which shall be written the titles of the lands distributed to the colonists, specifying the names, the boundaries and other requisites, and legal circumstances; and a certified copy of each title shall be taken from said book on paper of the second stamp, which shall be delivered to the interested person as his title."

"ART. 10. This book shall be preserved in the archives of the new colony, and an exact form of it shall be transmitted to the government, specifying the number of colonists, with their names and the quantity of land granted to each one, distinguishing that which is farming land with or without the facilities of irrigation, and that which is granted as grazing land."

The act of 1825 and the instructions issued to carry it into effect, when read in connection with the terms of the "conditions of the grant," abundantly show, we think, that the extravagant claim of the appellant is utterly without foundation. In this connection we can do no better than quote the words of Mr. Justice Brewer, then Circuit Judge. After quoting from the law of 1825 and the instructions just mentioned, he said: "Article eight of the law quoted above, prescribes what the government will do when the petition of an *empresario* for colonization is presented. If found conformable with this law, the government will immediately 'designate' to the contractors land whereon to establish themselves. This, of course, does not mean that the government will grant them the land, but simply that it will select and designate the place where a colony may be settled. So that when we find, in the first article of the grant, that the government assigns a given tract to the petitioners for the establishment of a colony, the assignment is made by virtue of this article eight of the law, and means simply the selection of a place for the colony. Passing on to article 12, we find what the government will give to the *empresario* specifically declared, to wit, for each hundred families five *sitios* of grazing land and five labors, at least the one-half of which shall be without the facility of irrigation. This article makes plain the meaning of article three of the grant, and shows that that means simply that, in consideration of

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the setting apart of this large tract of land, the petitioners agree to introduce and settle on that land two hundred foreign families. Articles 12 and 13 together provide what shall be given to the *empresario* who introduces eight hundred families, and receives more than eleven square leagues of land. This last article shows a clear intent that no party should obtain title to more than eleven square leagues, no matter what services in colonization he may render to the State. Articles 14, 15 and 16 provide what the individual settlers are to receive, and sections from 12 to 16, inclusive, explain fully the meaning of article five of the grant, which declares that the State retains title to all the surplus land within the grant after laying off that which belongs to the *empresarios* and their settlers. Thus the law makes plain the meaning of the contract, and shows that it was not a conveyance passing title. In other words, the grant must be presumed to have been made in pursuance of the law, and to be limited by the terms of the law. Indeed, it is doubtful whether a grant made in excess of the authority given by the law would be valid. This grant, in terms, refers to the law under which it was made, and shows that it was made in pursuance of the authority conferred by that law, which provides that the government will select a tract of land upon which the *empresario* may establish a colony, and that, if he does, he will be paid in land at a fixed rate, and that the colonists that he introduces will also receive definite amounts of land. This grant, made thus in pursuance of this law, means just what the law says it may mean, and was simply a designation of a tract within which the petitioners might establish a colony. It of itself passed title to no portion of the land to them." 41 Fed. Rep. 281, 282.

All this is in exact harmony with what this court said in *Spencer* v. *Lapsley*, 20 How. 264, 270, 271, speaking of the colonization law now under consideration: "The contract of an *empresario* obliged him to introduce colonists into a specific district. The colonist having a family was entitled to one league of land, of a particular quality, for which he paid a small sum to the government. The *empresario* was paid five leagues and five labors for every one hundred families intro-

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duced. Of course, the excess of land within the limits of the colony, after supplying the colonists and the *empresario*, remained to the government. The commissioner of distribution was an officer of the government, who superintended the fulfilment of the contract by the *empresario*. He ascertained the character of the colonists, allotted to them and the *empresario* their shares of land, and for that purpose appointed surveyors, received returns of survey, and executed the final titles. Usually this officer was not appointed until colonists were introduced, and a community was to be formed. The sale of the land within the limits of the colony might disturb the interest of the *empresario* or of the colonists, and hence reference of the contracts of sale to the commissioner for execution. If there were no colonists, and the *empresario* opposed no objection, there was no reason why sales should not be made, nor was there any occasion for the services of a commissioner." See also *Glenn* v. *United States*, 13 How. 250.

With respect to the averments of the bill that the Mexican government placed Beales in possession of the land, and recognized, in divers and sundry ways, that the fee in the land passed to him and Royuela, very little need be said. The official act of the Mexican government relied upon is set out in full, as before stated, and a reference to it shows that it does not necessarily refer to this grant. In fact, the inference is, if its very terms do not show it, that it does not. Its language is, that an order had been issued to the army of operation "to afford protection to the colonial establishments of yourself and Señor Edgerton." In view of the historical fact, noticed in *Gonzales* v. *Ross*, 120 U. S. 605, that Beales was interested in other *empresario* contracts, the above averments are, to say the least, very vague and uncertain. And the averment that Beales was put in possession of the tract is inconsistent with the Mexican colonization law, and the *empresario* contract relied upon. He could not have been put in possession of the whole region of country described, under the law of 1825; and he could not have been put in possession of any specific portion of it without first establishing a colony

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of at least one hundred families. As that was confessedly not done by him, no rights of property were acquired.

With respect to the averment that, by reason of the Texas revolution, the *empresarios* were prevented from carrying out their contract, it is sufficient to say that, if such had been the case, the contractors might have perfected their claim under the laws of Texas, as passed soon after that revolution. *Houston* v. *Robertson*, 2 Texas, 1. As there is no averment of any attempt to so perfect the claim, it is difficult to see what rights can be asserted under it at this late day.

Moreover, as the claim had never been perfected prior to the treaty of Guadalupe Hidalgo, it was not protected by virtue of that treaty. It needs no citation of authorities to support the general proposition of international law that private rights of property in a ceded territory are nowise affected by a treaty cession. But that is not this case. There could be no private rights of property, no vested interest, until the conditions of the contract had been complied with. This claim was one of the class which was expressly refused to be recognized by the treaty. Article 10 of the original draft of the treaty, as agreed upon between the commissioners representing this government and Mexico, was as follows:

"ART. 10. All grants of land made by the Mexican government, or by the competent authorities in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico. But the grantees of land in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfil the said conditions within the periods limited within the same respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty; in default of which the said grants shall not be obligatory upon the State of Texas, in virtue of the stipulations contained in this article. The fore-

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going stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid elsewhere than in Texas, put in possession under such grants; and in default of the fulfilment of the conditions of any such grant within the new period, which, as above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void." Message of the President of the United States, transmitting papers relative to the treaty of Guadalupe Hidalgo, Feb. 8, 1849, Ex. Doc. 50, H. R. 30th Cong., 2d Session, p. 17.

That article, however, was stricken out by the Senate of the United States, and in the message of President Polk the reasons for its rejection are stated in the following language, (Ib. 32:) "The objection to the 10th article of the original treaty was not that it protected legitimate titles, which our laws would have equally protected without it, but that it most unjustly attempted to resuscitate grants which had become mere nullities, by allowing the grantees the same period after the exchange of the ratifications of the treaty, to which they had been originally entitled after the date of their grants, for the purpose of performing the conditions on which they had been made. In submitting the treaty to the Senate, I had recommended the rejection of this article. That portion of it in regard to lands in Texas did not receive a single vote in the Senate. This information was communicated by the letter of the Secretary of State to the Minister of Foreign Affairs of Mexico, and was in possession of the Mexican government during the whole period the treaty was before the Mexican Congress, and the article itself was reprobated in that letter in the strongest terms. Besides, our commissioners to Mexico had been instructed 'that neither the President nor the Senate of the United States can ever consent to ratify any treaty containing the 10th article of the treaty of Guadalupe Hidalgo in favor of grantees of land in Texas or elsewhere.' And again, 'should the Mexican government persist in retaining this article, then all prospect of immediate peace is ended; and of this you may give them an absolute assurance.'"

It is contended, however, that the case of *United States* v.

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Arredondo, 6 Pet. 691, governs this case in favor of the contention of the appellant. In that case, however, the grant to Arredondo was of a specific tract of four square leagues with the condition that he should establish a colony thereon. This condition was held to be a condition subsequent. It differs from this case in that here there was no grant of any specific body of land, but a mere designation of a large tract within which a colony might be formed and established; after which the land to the colonists was to be allotted, and the premium lands to the *empresarios* measured off.

Neither does the case of *Gonzales* v. *Ross*, 120 U. S. 605, control this case. They are entirely dissimilar. In that case the grant was made under and by virtue of a law of Coahuila and Texas passed in 1832, and a commissioner appointed under that law put the grantee in possession of the tract, at the same time giving him the usual *testimonio* or deed. This court held that the grant was absolute in form and sufficient to pass the title. The reasoning of the court in that case, instead of supporting the theory of the appellant, in reality is against it. In support of the general theory of this case which we have adopted, see *Fremont* v. *United States*, 17 How. 542; *United States* v. *Armijo*, 5 Wall. 444; *Miller* v. *Dale*, 92 U. S. 473; *United States* v. *McLaughlin*, 127 U. S. 428.

There are other questions presented, but the foregoing virtually disposes of them. In no aspect of the case can the appellant recover. There is no error in the decree of the court below, and it is

Affirmed.

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SHELTON v. PLATT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 1155. Argued March 13, 16, 1891. — Decided April 6, 1891.

While an unconstitutional tax may confer no right, impose no duty and support no obligation, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction, where irreparable injury or other ground for equitable interposition is not shown to exist.

THOMAS C. PLATT filed his bill (subsequently amended) against J. W. Allen, comptroller of the State of Tennessee, and A. Shelton, sheriff, and S. D. Cate, deputy sheriff, of Hamilton County, Tennessee, in the Circuit Court of the United States for the Eastern District of Tennessee, as president of the United States Express Company, a joint stock company of the State of New York, and as one of the members thereof, on behalf of himself and his associates, who were too numerous to be joined as parties, to restrain the collection of a license tax from the said company for the years 1887, 1888 and 1889, under certain acts of the State of Tennessee of 1887 and 1889, in that behalf, alleged by him to be unconstitutional. Complainant averred that the comptroller had issued a distress warrant to the sheriff of Hamilton County, who had placed it in the hands of his deputy to execute, for the collection of the license taxes of 1887 and 1888, which warrant the said sheriff "has levied on or is about to levy on the property of the United States Express Company," and that the comptroller threatened to issue another distress warrant to collect the license tax for the year 1889.

And the bill then proceeded: "Your orator further shows that the property of the said United States Express Company in Tennessee is employed in interstate commerce in the said express business and is necessary to the conduct of it; that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business and subject it to heavy loss and

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damage, and the public served by it to great loss and inconvenience. Your orator further says that your orator and the United States Express Company are without adequate remedy at law in the premises."

The prayer was for an injunction against the collection of the taxes imposed by the acts of Tennessee referred to, or either of them, and from interfering or attempting to interfere in the operation of the company's business by reason of the non-payment of said taxes or either of them, and for general relief, process and answer.

Defendants filed a plea in abatement, setting up an act of the legislature of Tennessee entitled "An act to facilitate the collection of revenues," approved March 21, 1873, and insisting that, in accordance with its terms, "complainant's only remedy is to pay under protest the taxes complained of, and then sue within thirty days thereafter for a recovery of the amount so paid; and no injunction or other restraining order or writ to prevent the collection of said tax will lie." And also a motion to quash the writ and dismiss the bill, as amended, for the reasons, among others, that the suit was brought in a district other than that of which the defendant Allen was an inhabitant, and other than that in which he was found at the time the writ was served on him; that, under the public laws of the State of Tennessee, (namely, the act above mentioned,) complainant's only remedy is to pay under protest the taxes complained of and then sue to recover the same, and no restraining order will lie against the collecting officer; and that no irreparable injury or other ground of equitable jurisdiction is shown in the bill.

The motion to dismiss was sustained as to the defendant Allen, and judgment entered in his favor, but the motion was overruled as to the other defendants, they excepting; the plea was heard and stricken from the files, and exceptions taken; and defendants were granted leave to rely upon the matter of the plea and the several grounds of the motion in their answer. Defendants Shelton and Cate thereupon answered, restating the grounds of the plea and motion.

Replication was filed and the cause came on to be heard

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upon bill, answer and replication, and a decree was rendered perpetually enjoining defendants as prayed, and for costs, from which decree the defendants Shelton and Cate prayed an appeal to this court. The opinion of the Circuit Court will be found reported in 39 Fed. Rep. 712.

Sections 1 and 2 of the act of the legislature of Tennessee of 1873, entitled "An act to facilitate the collection of revenues," (Laws Tenn. 1873, c. 44, p. 71,) are as follows:

"SECTION 1. That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding, or take any steps for the collection of the same, alleged or claimed to be due by said officer, from any citizens, the party against whom the proceeding, or step, is taken shall, if he conceives the same to be unjust, or illegal, or against any statute, or clause of the constitution of the State, pay the same under protest, and upon his making such payment the officer or collector shall pay such revenue into the state treasury, giving notice at the time of payment to the comptroller, that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof, and the same may be tried in any court having jurisdiction of the amount and parties, and if it be determined that the same was wrongfully collected as not being due from the said party to the State for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury.

"SEC. 2. That there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other, or different funds, than such as the taxpayer may tender, or claim the right to pay, than that above provided, and no writ for the prevention of the collection of any revenue claimed,

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or to hinder and delay the collection of the same, shall in anywise issue either injunction, supersedeas, prohibition or any other writ or process whatever, but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and in no other manner."

Mr. G. W. Pickle, Attorney General for the State of Tennessee, and *Mr. W. G. M. Thomas* for appellants.

Mr. W. W. McFarland for appellee. *Mr. William Parkin* was with him on the brief.

Mr. Chief Justice Fuller delivered the opinion of the court.

The question whether, even if the act under which the tax in question was imposed were unconstitutional and the tax void, complainant on behalf of the express company was entitled to the relief accorded, meets us on the threshold.

It was ruled in *Dows* v. *Chicago*, 11 Wall. 108, 112, that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant. And Mr. Justice Field, speaking for the court, said: "The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid,

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against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action. We see no ground for the interposition of a court of equity which would not equally justify such interference in any case of threatened invasion of real or personal property."

In *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525, Mr. Justice Bradley declared that it was "well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation." And he quoted, with approval, the language of Judge Cooley on this subject: "To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he would fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in the courts of equity." Cooley on Taxation, p. 536. The same learned author says, (p. 538:) "When a tax is assessed as a personal charge against the party taxed, or against his personal property, it is difficult to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal and the party makes payment, he is entitled to recover back the amount. The case does not differ in this regard from any other case in which a party is compelled to pay an illegal demand; the illegality alone affords no ground for equitable interference, and the proceedings to enforce the tax by distress and sale can give none, as these only constitute

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an ordinary trespass. To this point the decisions are numerous. The exceptions to this rule, if any, must be of cases which are to be classed under the head of irreparable injury."

Irreparable injury is the sole ground upon which jurisdiction in equity can be regarded as invoked in this case. The jurisdictional averments are: "That the property of said United States Express Company in Tennessee is employed in interstate commerce in the said express business, and necessary to the conduct of it; that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience." And "that your orator and the United States Express Company are without adequate remedy at law in the premises."

The latter allegation is a mere matter of inference, and it is necessary that by facts averred or proven the conclusion should be made out. The answer denied, in the language of the previous motion, that any irreparable injury or other ground of equitable jurisdiction was shown in the bill, and asserted that the plaintiff had full, adequate and complete remedy at law under the act of 1873. As the case was tried on bill, answer and replication, it is taking the most favorable course for complainant to determine whether the decree must stand or fall by the averments of the bill alone. But testing it in that way, we do not see how it can be sustained. The trespass involved in the levy of the distress warrants was not shown to be continuous, destructive, inflictive of injury incapable of being measured in money, or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on, would subject it to loss, damage and inconvenience which would be in their nature irremediable. The bill showed the company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons

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and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy. Nor did the mere fact that its property might be used in the conduct of interstate commerce give jurisdiction. But in addition to all this, since 1873 there has been a statute in existence in Tennessee, providing a remedy at law, which has been pronounced by this court simple and effective. *Tennessee* v. *Sneed*, 96 U. S. 69. Under that act, where an officer charged by law with the collection of revenue due the State takes any steps for the collection of the same, a party conceiving the tax to be unjust or illegal may pay it under protest, and sue the officer to recover the money back, and if the court determines that it was wrongfully collected, then, upon its certificate to that effect, the comptroller "shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury." And the act further provides that there shall be no other remedy in any case of the collection of revenue, and no writ for the prevention of such collection or to hinder and delay it shall in any wise issue, either injunction, supersedeas, prohibition or any other writ or process whatever.

This act has been sanctioned and applied by the courts of Tennessee. *Nashville* v. *Smith*, 86 Tennessee, 213; *Railroad* v. *State*, 8 Heiskell, 663, 804. It is, as counsel observe, similar to the act of Congress forbidding suit for the purpose of restraining the assessment or collection of taxes under the internal revenue laws, in respect to which this court held that the remedy by suit to recover back the tax after payment, provided for by the statute, was exclusive. *Snyder* v. *Marks*, 109 U. S. 189; 14 Stat. 152, 475. Legislation of this character has been called for by the embarrassments resulting from the improvident employment of the writ of injunction in arresting the collection of the public revenue; and, even in its absence, the strong arm of the Court of Chancery ought not to be interposed in that direction except where resort to that court is grounded upon the settled principles which govern its jurisdiction.

It is asserted by counsel that a court of equity has jurisdic-

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tion to restrain the collection of a tax when the tax is wholly illegal and void, and that such jurisdiction has been uniformly exercised in the Federal courts. *Allen* v. *Balt. & Ohio Railroad*, 114 U. S. 311; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Cummings* v. *National Bank*, 101 U. S. 153; and *Dodge* v. *Woolsey*, 18 How. 331, are cited; but the jurisdiction will be found to have rested on other grounds than merely the unconstitutionality of the taxes involved.

In *Allen* v. *Baltimore & Ohio Railroad*, Allen was auditor of public accounts of Virginia, and Hamilton, treasurer of Augusta County, in that State. The auditor had assessed certain railroads upon their real estate, not having any rolling stock, as being in default for non-payment of taxes assessed by the board of public works, and had placed copies of the assessment in the hands of the defendant Hamilton, as treasurer of Augusta County, for collection, in pursuance of which he had levied upon certain cars and locomotives belonging to complainant, and used by it in operating said railroads as lessee, for part of the taxes, and threatened to make further levy upon other cars and engines and sell them for payment of said taxes; and the bill prayed for an injunction on the several grounds of irreparable damage, avoidance of multiplicity of suits, removal of cloud upon title, etc. It was admitted in the case that if the property of the complainant levied on should be sold, great sacrifice and loss must result therefrom, and that the withdrawal of the rolling stock and machinery proposed to be sold would cause serious and prolonged embarrassment to complainant's business; that much delay must accrue before said rolling stock and machinery, if sold, could be replaced; and that it would be difficult, if not impracticable, to ascertain and estimate with even proximate certainty the losses and damages which would result to complainant from the sale, so that although the estate of Hamilton might be sufficient to meet any verdict for damages if the sale should be adjudged to be illegal, the pecuniary value of complainant's losses and damages could not be properly and adequately ascertained and fixed by the verdict of a jury. This admission made a case of irreparable injury.

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In *Osborn* v. *Bank of the United States*, the court held that the effect of the law of Ohio in question would be the expulsion of the bank from the State; that the injury done thereby would be in its nature irreparable; and further that as by the amended and supplemental bill it appeared that the money and notes of the bank were in the possession of one of the defendants and kept separate and apart from all other money and notes, the principle of preventing the transfer of a specific article, which if transferred might be lost to the owner, applied.

In *Cummings* v. *National Bank*, the jurisdiction was maintained upon the ground of preventing multiplicity of suits, as well as that the remedy by injunction against an illegal tax was expressly granted by a statute of the State whose levy of taxes was drawn in question.

The ground upon which *Dodge* v. *Woolsey* proceeded was that a stockholder had a remedy in chancery against the directors of his corporation to restrain them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits, which might lessen the value of the shares, if the acts intended to be done amounted to a breach of trust or duty, and that the refusal of the directors to resist the collection of a tax, which they themselves believed to have been imposed upon them in violation of their charter, was in legal effect a breach of trust.

The Circuit Court held the act of 1873 inapplicable to an unconstitutional tax, upon the authority of *Poindexter* v. *Greenhow*, 114 U. S. 270. That was an action of detinue brought by Poindexter, a taxpayer, against Greenhow, treasurer of Richmond, Virginia, for a desk belonging to plaintiff, seized and taken by Greenhow for the purpose of raising the tax claimed to be due from plaintiff after he had tendered coupons in payment thereof in pursuance of the Virginia act of 1871, making the coupons receivable for taxes. In 1882, Virginia passed an act providing that, in case of proceedings instituted against a taxpayer for the collection of his tax, notwithstanding his tender of coupons in payment thereof, he should pay the tax under protest in lawful money, and then

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sue the officer for the amount, and if it should be determined that it was wrongfully collected, the amount should be returned, and that no writ of injunction, supersedeas, mandamus, prohibition or other writ whatever should be issued to hinder or delay the collection of the tax. At the same time several other acts were passed calculated to impede the operation of the act of 1871. This court held that the tender was equivalent to payment; that the taxpayer had the right to stand upon such payment once made; and that the acts of 1882 were unconstitutional so far as they had the effect of depriving the taxpayer of his remedy by detinue, or trespass, or case, or other proper action, for unlawful seizure of his goods after tendering tax-receivable coupons in payment of his taxes. *McGahey* v. *Virginia*, 135 U. S. 662, 675, 676. But this was far from deciding that the remedy for recovery back would not have been sufficient if the validity of the tax had alone been in issue. The question related to the previous contract that the coupons should be receivable for taxes, which contract the subsequent legislation impaired, and its disposition did not involve the application of the act of 1882, under the circumstances existing here. And while an unconstitutional tax may, in the language of the learned judge holding the Circuit Court, confer no right, impose no duty and support no obligation, it will be perceived that, in our view, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist.

We are constrained to hold upon this record that the decree cannot be sustained, and it is therefore

Reversed and the cause remanded to the court below with a direction to dismiss the bill.

MR. JUSTICE HARLAN dissented.

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WESTERN ELECTRIC COMPANY v. LARUE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 279. Argued April 1, 1891. — Decided April 13, 1891.

A telegraph sounder constructed under letters patent No. 352,317, granted November 9, 1886, to Charles D. Haskins, infringes the third claim of letters patent No. 270,767 for a new and useful improvement in telegraph keys, viz., "The combination, in a telegraph key, of the lever fulcrumed upon the torsional spring, with the adjusting screws H H′, for regulating the amplitude of the lever movement and the retractile resistance of the torsion-spring, substantially as described."

While the promotion of an old device, such, for instance, as a torsional spring, to a new sphere of action, in which it performs a new function, involves invention, the transfer or adaptation of the same device to a *similar* sphere of action, where it performs substantially the same function, does not involve invention.

Winans v. *Denmead*, 15 How. 330, affirmed and applied.

THIS was a bill in equity brought by LaRue, plaintiff in the court below, for the infringement of letters patent No. 270,767, issued to Edgar A. Edwards, January 16, 1883, for a new and useful improvement in telegraph keys.

In the specification the patentee stated that his invention related "to telegraph keys or instruments used for transmitting telegraphic signals, and is an improvement on the well-known Morse key, being in substituting for the trunnions or pivots upon which the lever vibrates a torsional spring or strip of metal." After describing the mechanism, as illustrated by his drawings, he made a further statement, as follows: "When a telegraph key is constructed as herein described, the side or lateral movement is reduced to a minimum. The adjustment of trunnion set screws is obviated. The torsional metal springs will not wear out, but last indefinitely. The adjusting screws H H′ serve the purpose of regulating the amplitude of the lever movement, and also serve the purpose of regulating the retractile resistance of the torsion-spring. By this arrangement a secondary retractile spring to resist the downward

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movement of the contact-lever is not necessary. In ordinary telegraph keys a retractile spring is always supplied to regulate the force required to depress the lever, as well as pivots or trunnions on which the lever vibrates. In my invention the torsional spring not only takes the place of the pivots or trunnions, but when used in connection with the adjusting screws H H′, takes the place of the ordinary retractile spring. The construction of the key is thus simplified and cheapened by discarding one of the hitherto necessary features, viz., the retractile springs. I do not limit myself to the application of torsional springs to telegraph keys alone, as it is obvious the torsional strip or spring may be applied to other electrical instruments. Thus it may replace the pivots or trunnions of the relay and sounder."

The defences were, in brief, anticipation and non-infringement. Upon a preliminary hearing in the court below an injunction was granted, 28 Fed. Rep. 85, and upon the final hearing, 31 Fed. Rep. 80, plaintiff obtained a decree perpetuating the injunction, and for $110 damages for the infringement of the third claim of the patent, which reads as follows: "The combination, in a telegraph key of the lever fulcrumed upon the torsional spring, with the adjusting screws H H′, for regulating the amplitude of the lever movement and the retractile resistance of the torsion-spring, substantially as described." From this decree an appeal was taken to this court.

Mr. George P. Barton for appellant.

Mr. Arthur v. Briesen for appellee.

Mr. Justice Brown delivered the opinion of the court.

The invention covered by this patent consists in the use in a telegraph key of a flat strip of metal supported at either end upon posts by means of adjustable screws and to the centre of which the lever is fastened. The torsional action of this piece of metal serves as a spring support for the lever. The main object of the invention is the substitution of this torsional spring for the ordinary pivotal support previously used, which consisted

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of tapering pivots or gudgeons projecting from the sides of the lever into the bearings. The testimony indicates that the pivots require very exact construction and adjustment; that they are apt to wear loose in their sockets; and that inexperienced operators are apt to turn the screws, which carry these sockets too far or not far enough, thereby rendering the motion of the lever either too difficult or too easy. For this somewhat objectionable pivotal support, the patentee substitutes a flat torsional spring, fastened at either end by ordinary screws to the top of posts or supports. Upon the middle of this spring is riveted the lever of the key, which carries regulating screws for controlling the extent of its vibrations. The specification describes the manner in which, by means of this torsional spring, the lever is enabled to play freely between its points of contact without the use of the ordinary retractile spring.

The defendant is making a telegraph sounder under letters patent No. 352,317, granted November 9, 1886, to Charles D. Haskins, an employé of the defendant company, who had previously superintended the construction of keys under the direction of plaintiff LaRue, and was consequently familiar with his device. In this patent Haskins states the object of his invention to be "to provide convenient means for supporting the armature and armature-lever in the proper position relative to the electro-magnet and to dispense with the employment of trunnions or a pivoted support," and admits that "it has heretofore been proposed to support a lever of a key or an armature upon a flat torsional spring." The following extracts from his specification (omitting the letters) are pertinent in connection with the question of infringement: "A spring or plate of resilient metal is attached at its central part to the lever by means of a screw, or in any other convenient manner; the ends of this spring are respectively secured to the posts by screws. . . . The lever is preferably not dependent for its retractile force upon the [torsional] spring, although it may be so, but is assisted by a coil spring extending from an arm secured to the lever, preferably immediately beneath the spring C. . . . The invention has been described in connection with a telegraphic sounder; but it is evident that the torsion-

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spring may be applied to the armature-lever of any telegraphic receiving-instrument, or to the lever of any telegraphic key, without departing from the spirit of the invention." The "torsional spring," or, as he sometimes terms it, the "flat spring," or "flat supporting-spring," is made an element in each claim of his patent.

So far as the testimony discloses, LaRue was the first to apply the principle of the torsional spring to telegraphic instruments, although springs of similar description had been previously used in clocks, doors, and perhaps some other articles of domestic furniture. Prior to his invention, telegraph keys were pivoted upon trunnions, and were regulated in their movements either by a coil spring, as shown in the old style of Morse key, or by a flat steel spring to which they were riveted, as in the old style of Western Union key, or the key itself was constructed in the form of a flat spring riveted at one end to the bed or plate, as shown in the Warner Spring Lever Key and in the Exhibit Spring Lever Key.

The Pole Changer, which is an instrument used by telephone companies for the purpose of calling up their subscribers, consists of a lever which vibrates back and forth by the aid of a flat spring, to which it is attached in much the same manner as the pendulum of an old-fashioned clock is connected with the spring upon which it swings. There is also a flat piece of metal which is attached to the armature, and stands vertically when the instrument lies upon the table, and which has apparently a certain torsional action; but it is evidently not depended upon for anything more than a supporting fulcrum for the armature and lever. It is stated by experts to exert some retractile force, but not enough to make the instrument operate in the way it is designed to.

The Exhibit Adjustable Torsional Spring is not the flat spring of the patent, nor has it the adjusting screws, nor the supporting posts with the fastening screws, nor in fact any of the features of the patent in suit. It is merely a wire attached to two supports, across the centre of which, between the supports, a bar or lever extends, which is attached to the wire and is supported thereby. But the ends of this wire pass through

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comparatively large holes in the end supports, and thereby have considerable freedom of movement. The very fact that the holes are larger than the wire indicates that the wire can exert no torsional force. It is a crude and apparently imperfect device, and contains no suggestion of the flat torsional spring peculiar to the patent in suit. Indeed, there is nothing in any of these exhibits which shows the use of a torsional spring in a telegraphic instrument, and while the invention does not seem to be one of great importance, we think the adaptation of this somewhat unfamiliar spring to this new use, and its consequent simplification of mechanism, justly entitles the patentee to the rights of an inventor.

The question of infringement turns upon the construction to be given to the third claim of the patent, which is, in terms, for the combination, in a telegraph key, of a lever fulcrumed upon a torsional spring, with adjusting screws for regulating its movement. If this claim be limited strictly to a telegraph key, by which is understood the instrument which is used at the office of transmission for sending off messages, then it is clear that defendant does not infringe, since it makes use of a similar combination only in connection with a telegraph sounder, or instrument used at the receiving office for delivering or enunciating the message. It is evident, however, that both of these patentees understood that the combination described in their patents could be used in either connection, since Edwards says in his specification that he does not limit himself "to the application of torsional springs to telegraph keys alone, as it is obvious the torsional strip or spring may be applied to other electrical instruments. Thus it may replace the pivots or trunnions of the relay and sounder." Haskins also admits that "it has heretofore been proposed to support a lever of a key or an armature upon a flat torsional spring," and says that his "torsion-spring may be applied to the armature-lever of any telegraphic receiving-instrument, or to the lever of any telegraphic key, without departing from the spirit of the invention."

The use of the combination is practically the same in both instances. There are the same elements of a lever fulcrumed

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upon a torsional spring, and adjusting screws for regulating the amplitude of the lever movement, and the retractile resistance of the torsional spring. They are used for purposes which differ principally in name. The key transmits the message, the sounder receives it. The material part of the key is a lever which completes and breaks an electric circuit; the sounder consists merely of a lever which completes and breaks a magnetic circuit. In both cases, the lever is riveted to and supported by a flat torsional spring, which is itself supported at its ends upon upright posts, to which it is fastened by screws. The object of the spring in each instance is to allow the lever to play back and forth between the exceedingly narrow limits fixed by the set screws. The employment of this spring in connection with the sounder is such a new or double use as would occur to an ordinary mechanic who had seen the Edwards key in operation. It brought into play no faculty of invention. While the promotion of an old device, such, for instance, as a torsional spring, to a new sphere of action, in which it performs a new function, involves invention, the transfer or adaptation of the same device to a *similar* sphere of action, where it performs substantially the same function, does not involve invention.

Against this new and analogous use of his combination, the patentee is as much entitled to protection as if the word "sounder" had been expressly inserted in his claim. Since the case of *Winans* v. *Denmead*, 15 How. 330, it has been the settled doctrine of this court, as expressed in the opinion of Mr. Justice Curtis, p. 343, that "the patentee, having described his invention and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of these forms." This is practically restated in different language in subsequent cases, and amounts to a declaration that the application of the patented device to another use, where such new application does not involve the exercise of the inventive faculty, is as much an infringement as though the new machine were an exact copy of the old. *Sewall* v.

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Jones, 91 U. S. 171, 183; *Howe* v. *Abbott*, 2 Story, 190; *Walter* v. *Potter*, Webster Pat. Cas. 585.

Some stress is laid by the defendant upon the fact that the "circuit-breaking" lever is made an ingredient of the first, second and fourth claims of the patent, and that as the sounder has no circuit-breaking lever, but only an armature-lever, there is no infringement. Assuming, however, what as a matter of fact seems doubtful, that the lever of the sounder is not a circuit-breaking lever, the objection loses all its force in view of the language of the third claim, the only one found to be infringed, in which the limitation of the circuit-breaking lever is omitted, and a "lever fulcrumed upon the torsional spring" is substituted.

The further objection that in the defendant's sounder a retractile spring is used in aid apparently of the torsional spring, suggests rather than justifies an argument that the torsional spring is useless, and that the sounder would be inoperative without the retractile spring. If such were the fact, it would be an excellent reason for discontinuing the use of the torsional spring, and thereby avoiding beyond all question the charge of infringing the patent. But, notwithstanding the testimony of Mr. Haskins, that he found the best results to be obtained when the torsional spring was simply passive, allowing the armature to lie with its own weight upon the magnet, depending wholly upon the retractile spiral spring underneath to produce the upward movement, the fact seems to be that the defendant's sounder will operate about as satisfactorily if only the torsional spring is used. And even if the defendant does use the retractile spring in aid of the torsional spring, it could not thereby escape the charge of infringement. The object of the torsional spring is not only to do away with the necessity of a retractile spring, but to substitute for the ordinary pivotal bearings the torsional support. Giving Haskins's testimony its full weight, it still remains uncontradicted that he does use the torsional spring as a substitute for the trunnions or pivots theretofore used to support the lever.

The claim that defendant does not use the adjusting screws is equally without foundation. Indeed, this suggestion is dis-

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posed of by defendant's own expert, who testifies to finding adjusting screws having a relation to the sounder similar to that of the screws H H′ to the lever of the key in the patent, but he says that in the sounder they did not appear to have any effect upon the retractile force applied to the lever. It is evident, on examination, that their functions are practically the same in every particular.

The last defence of want of utility is also fully met by the fact that Haskins, an employé of the defendant, after the commencement of this suit, took out the patent for a telegraph sounder, the main element of which is the torsional spring of the Edwards patent, and that defendant, upon the accounting, stipulated that a decree might be entered for a royalty of ten cents apiece, on eleven hundred sounders made and sold by the defendant embodying the Edwards invention. Under such circumstances, it does not lie in the mouth of the defendant to claim that the invention is useless. Walker on Patents, § 85; *Lehnbeuter* v. *Holthaus*, 105 U. S. 94; *Morgan* v. *Seaward*, 1 Webster Pat. Cas. 170.

The decree of the court below is *Affirmed.*

SEEBERGER *v.* FARWELL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1441. Argued March 30, 31, 1891. — Decided April 13, 1891.

Under Schedule K of § 2502 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, 22 Stat. 509, women's and children's dress goods, composed of wool and cotton, valued at less than 20 cents per square yard, and weighing less than 4 ounces to the square yard, the cotton being carded in with the wool from which the yarn composing the warp was spun, there being 94 per cent of wool and 6 per cent of cotton, the cotton being put in to secure a lower classification for duty, and an ordinary examiner not being able to detect the cotton without a careful examination, and there being no threads or yarns made wholly of cotton or other material than wool, are dutiable at 5 cents per square yard and 35 per cent ad valorem, and not at 9 cents per square yard and 40 per cent ad valorem.

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THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Percy L. Shuman for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Northern District of Illinois, in August, 1888, by John V. Farwell and others, copartners as John V. Farwell & Co., against Anthony F. Seeberger, collector of customs for the port and district of Chicago, to recover an alleged excess of duties, paid under protest, in that month, on a quantity of imported women's and children's dress goods, which were dutiable under the provision of Schedule K of section 2502 of the Revised Statutes, as enacted by section 6 of the act of March 3, 1883, c. 121, which provided for the following rates of duty on the following articles, after July 1, 1883, 22 Stat. 509: "Women's and children's dress goods, coat linings, Italian cloths, and goods of like description, composed in part of wool, worsted, the hair of the alpaca, goat or other animals, valued at not exceeding twenty cents per square yard, five cents per square yard, and in addition thereto, thirty-five per centum ad valorem; valued at above twenty cents per square yard, seven cents per square yard, and forty per centum ad valorem; if composed wholly of wool, worsted, the hair of the alpaca, goat or other animals, or of a mixture of them, nine cents per square yard and forty per centum ad valorem, but all such goods with selvedges, made wholly or in part of other materials, or with threads of other materials introduced for the purpose of changing the classification, shall be dutiable at nine cents per square yard and forty per centum ad valorem: *Provided*, That all such goods weighing over four ounces per square yard shall pay a duty of thirty-five cents per pound and forty per centum ad valorem."

The case was tried by the court without a jury. It found the issues for the plaintiffs, and assessed their damages at $3265.66; and a judgment was entered in their favor for that

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amount, with $23.16 costs, to review which the defendant has brought a writ of error.

The opinion of the court is reported in 40 Fed. Rep. 529, and it made a special finding of facts, to the effect that the goods in question were composed of wool and cotton, were valued at less than 20 cents per square yard, and weighed less than 4 ounces to the square yard; that the defendant assessed a duty upon them of 9 cents per square yard and 40 per centum ad valorem; that the plaintiffs paid the duties under protest, for the purpose of obtaining possession of the goods, and in due time protested to the collector against the exaction, and seasonably appealed to the Secretary of the Treasury, who sustained the decision of the collector, and the suit was brought in due time; and that in the protest the plaintiffs claimed that the goods should have been assessed at a duty of 5 cents per square yard and 35 per centum ad valorem. The court also found that the goods were composed of wool and cotton, the cotton being carded in with the wool from which the yarn composing the warp of the goods was spun, there being about 6 per cent of cotton mixed with the wool, so that the goods were composed of about 94 per cent in quantity of wool and 6 per cent in quantity of cotton; that the cotton was mixed with the wool from which the yarn composing the warp of the goods was spun, for the purpose of securing the classification of the goods under the clause before quoted, so that they would be dutiable at 5 cents per square yard and 35 per centum ad valorem; that the ordinary examiner of the goods would not detect the cotton without careful examination; that the goods had no selvedges of different material from the body of them, and there were no threads or yarns made wholly of cotton or other material than wool; and that it cost slightly more to manufacture the goods with such mixture than it would to make them all of wool. The court, therefore, found that the goods were composed in part of wool and part of cotton, weighing less than 4 ounces to the square yard and valued at not exceeding 20 cents per square yard.

The court, in its opinion, said that the collector, in classifying the goods, evidently assumed that the purpose of mixing

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the cotton with the wool was to secure a low classification, and assumed also that so small a quantity of cotton would not materially change the character of the goods, as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, the court was of opinion that manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate; that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do so; and that goods made of 94 per cent in bulk of wool and 6 per cent in bulk of cotton fairly came within the description of goods composed in part of wool.

We concur in this view, and the judgment is

Affirmed.

Mr. Justice Gray and Mr. Justice Brown dissented for the reasons stated in their opinion in *Magone* v. *Luckemeyer*, *post*, 614.

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MAGONE v. LUCKEMEYER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 880. Argued March 30, 31, 1891. — Decided April 13, 1891.

The case of *Seeberger* v. *Farwell*, *ante*, p. 608, affirmed and applied to goods in which the percentage of cotton varied from 1.99 to 4.47.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Francis Lynde Stetson for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This case involves the same question as that presented in No. 1441, *Seeberger* v. *Farwell*, *ante*, p. 608, just decided.

It is an action brought by Edward Luckemeyer and others, composing the firm of Luckemeyer, Schefer & Co., against Daniel Magone, collector of customs of the port of New York, in the Supreme Court of the State of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover an alleged excess of duties, paid under protest in December, 1887, on like goods with those involved in No. 1441. It was tried by a jury, which found a verdict for the plaintiffs, on which they had a judgment, including costs, for $291.33. The defendant sued out a writ of error.

The percentage of cotton in the goods varied from 1.99 to 4.47. The cotton was introduced into the warp of the fabric prior to the spinning process. The filling was entirely of wool. The warp consisted of woollen and cotton fibres twisted together, but no separate, single, distinct, continuous thread of cotton existed therein. The selvedges of the goods were formed from the warp threads, drawn together in a dent, and were composed of wool and cotton in the same combination

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and extent as the warp. In appearance, texture, quality, and use, the goods were indistinguishable from women's dress goods composed wholly of wool, and the cotton in them could be discovered only by chemical analysis. The original purpose of introducing the cotton into the warp was to change the classification of the goods. A report of the case is found in 38 Fed. Rep. 30.

The defendant moved that a verdict be directed for him, on the ground that the selvedges of the goods were made wholly or in part of other materials than wool, introduced for the purpose of changing the classification; and on the further ground that threads of other materials were introduced into the goods for the purpose of changing the classification, the warp being a compound thread composed of wool and cotton; and on the further ground that the goods were substantially composed of wool, the cotton being an insignificant part of them and not sufficient to take them out of the class of dress goods composed wholly of wool, dutiable under Schedule K at nine cents per square yard and 40 per centum ad valorem. These several motions were denied by the court and the defendant excepted to each denial.

The court instructed the jury that a mixed-material thread, of which the principal part was wool, was not a thread of other material, within the meaning of the statute, to which instruction the defendant excepted. It submitted to the jury the question whether threads of other materials had been introduced for the purpose of changing the classification. It further instructed the jury to inquire whether there had been introduced into the goods threads of material other than wool or worsted, "that is, thread or threads of other material, not composition or compound thread composed of wool and other materials, but a thread standing by itself, of material other than wool." To this instruction the defendant excepted. It further instructed the jury that the plaintiffs were not prohibited from so manufacturing goods as to conform to a lower rather than a higher exaction of the tariff; and that though they might have adopted a very technical device to escape the higher rate, the question presented by the case was only

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whether their goods were embraced within the higher rate, and not whether they had evaded the law. To this instruction the defendant excepted.

The defendant requested the court to charge the jury that, if they found that the selvedges of the goods were made wholly or in part of cotton, introduced for the purpose of changing the classification, there should be a verdict for the defendant. The court refused so to charge, and the defendant excepted. He further requested the court to charge, that if the jury found that the goods were women's dress goods substantially composed of wool, and known in trade and commerce as all-wool fabrics, the defendant was entitled to a verdict. The court refused so to charge, and the defendant excepted. He also requested the court to charge, that if the jury found that the quantity of cotton introduced into the goods was so insignificant as not to alter the character of the goods and remove them from the category of all-wool dress goods, as known in trade and commerce, the defendant was entitled to a verdict. The court refused so to charge, and the defendant excepted.

The views announced by us in deciding No. 1441 control the present case.

It is assigned for error, that the court sustained the objection to a question put by the defendant to a witness, as to whether the goods in question were bought and sold in this country as all-wool goods. The objection was made on the ground that the question was irrelevant. We think that the question was properly excluded.

Judgment affirmed.

Mr. Justice Brown, with whom Mr. Justice Gray concurred, dissenting.

Mr. Justice Gray and myself are unable to concur in the opinion of the court in this case. The facts are substantially as follows: By the Tariff act of 1883 woollen dress goods were taxed as follows: If composed *in part* of wool, worsted, etc., and valued at not exceeding 20 cents per square yard, 5 cents

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per yard and 35 per cent *ad valorem.* If composed *wholly* of wool, worsted, etc., or of a mixture of them, 9 cents per yard and 40 per cent *ad valorem.* But all such goods (1) with *selvedges* made wholly or in part of other materials, or (2) with *threads* of other materials introduced for the purpose of changing the classification, shall be dutiable at the higher rate of all-wool goods.

It was conceded that in appearance, texture, quality and use the goods in question were indistinguishable from women's dress goods composed wholly of wool, that the cotton in the goods could be discovered only by chemical analysis, and that the original purpose of introducing cotton in the warp was to change the classification. It is conceded that if threads entirely of cotton had been introduced into the goods for the purpose of changing the classification, they would be dutiable as all woollen goods; but in this case threads had been introduced composed partly of *cotton* and partly of *wool*, and the opinion of the court finds that these are not threads of "other materials," although the amount of cotton in the fabric is less than if these threads were entirely composed of cotton, and hence that they are dutiable as mixed goods. It would seem to follow from this that if they are not threads of "other materials" they must be threads of wool, which certainly would make them all woollen goods.

Assuming, however, that these introduced threads are half cotton and half wool, and that the amount of wool in the entire fabric is 96 per cent, the consequences are these: If the goods contain 92 per cent of wool, a thread wholly of cotton being introduced to change the classification, they are dutiable as all-wool goods; but if the fabric contains 96 per cent of wool, by reason of the introduced thread being composed partly of wool and partly of cotton, they are dutiable as mixed goods. It seems to us that no such conclusion should be possible, but that the intention of Congress was that no one should be permitted to evade the classification of all-wool goods by the introduction of an inappreciable amount of other material which should not as a matter of fact change its character as an all-wool fabric.

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We think that the thread composed partly of wool and partly of cotton is a thread of "other materials" within the meaning of the act. Congress having enacted that duties on all-wool goods should not be evaded by the introduction of a cotton thread, we can hardly conceive it possible that they intended to permit an evasion by the introduction of a thread partly of wool and partly of cotton, making the fabric nearer an all-wool fabric than if the thread had been composed wholly of cotton.

WILSON *v.* EVERETT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 268. Argued and submitted March 26, 1891. — Decided April 13, 1891.

Instructions to a jury upheld, where they could not have prejudiced the party complaining.

On a writ of error, this court cannot review any error committed by a jury in finding an amount of damages; nor take cognizance of a complaint that a motion for a new trial was overruled, or that the verdict of the jury was contrary to law and not warranted by the testimony.

As the writ of error was sued out merely for delay, this court awarded 10 per cent damages on the amount of the judgment, in addition to interest.

THE case is stated in the opinion.

Mr. J. M. Patterson and *Mr. C. S. Thomas* for plaintiff in error, submitted on their brief.

Mr. R. T. McNeal (with whom was *Mr. E. T. Wells* on the brief) for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the District of Colorado, by William S. Everett and James M. Robinson, against William J. Wilson, to recover the sum of $65,000, for alleged services performed

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by the plaintiffs at the request of the defendant, between June 1, 1883, and November 1, 1885, in and about the sale of certain lands and personal property.

The bill of particulars alleged that the services were rendered at the request of the defendant in and about negotiating a sale by him to the New United States Cattle Ranch Company, Limited, of London, England, of the Circle Ranch, located on the Republican River and its tributaries, in the States of Colorado, Kansas and Nebraska, with the appurtenances and the cattle and horses which were, on or about December 14, 1883, upon the range belonging to or connected with the said Circle Ranch, and the buildings and dwellings, and certain personal property belonging to or connected with the ranch, and the water rights and other rights and privileges pertaining thereto.

A supplemental bill of particulars averred that the services were rendered under an oral employment of the plaintiffs by the defendant, by which they were to receive for their commissions, in the first instance, $5000, and all that the property should sell for over $225,000; that this employment was made some time in the summer or fall of 1883, and reiterated and renewed in Chicago about February, 1884; that, by a subsequent arrangement, the defendant agreed to pay the further sum of $10,000; that the services were rendered and negotiations were carried on, partly by letter, partly by telegram and partly orally through agents of the plaintiffs in London, England; that it was impossible to state the time consumed in such correspondence and negotiations; that the same took place at intervals between the time of the first employment and the conclusion of the sale in the spring of 1884; that the plaintiff Everett made one trip from Chicago to Denver, in December, 1883, occupying about two weeks, the purpose of which was to confer with the defendant and settle and adjust the terms of an agreement to be executed by the defendant and to be submitted to the proposed purchaser; that both of the plaintiffs made another trip to Denver, in February, 1884, remaining three weeks or thereabouts; that there were oral negotiations between the plaintiffs and the agents of the purchaser, both in Chicago and in Colorado, which extended over.

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several weeks; and that the number of hours or days consumed, or the number of hours or days consumed in the negotiations in London, could not be stated.

The answer of the defendant denied the allegations made. Before the trial, the plaintiff Robinson died, and the cause proceeded in the name of Everett as survivor, and was tried by a jury, which rendered a verdict for the plaintiff, on the 21st of January, 1887, for $10,000.

On the next day, in the same term, the jurors being all present and in the jury-box, the following interrogatory, presented by the plaintiff, was asked by the court of them: "Did you include in your verdict the plaintiff's claim for any excess over the sum of $225,000, denominated in the evidence the surplus or profits?" To this the jurors by their foreman answered: "Our understanding is that Mr. Wilson never received anything in excess of $225,000." It was ordered by the court that this question and the answer thereto be entered of record in connection with the verdict of the jury, for further consideration as occasion might arise. The defendant moved for a new trial, which motion was denied; and a judgment was entered for the plaintiff for $10,000 and costs, to review which the defendant has brought a writ of error.

The defendant specifies four parts of the charge of the court to the jury, to which he excepted and of which he complains. His principal contention is, that the plaintiff ought not to have recovered more than $5000, and that the allowance by the jury of more than that sum arose from the alleged erroneous instructions excepted to.

The first alleged error is in giving the following instruction to the jury: "Now, with such an arrangement as this, obviously if it was carried out upon those terms, it was going to be a question of some importance as to who was to wait for the deferred payments — if the plaintiffs were to wait, or the defendant, Mr. Wilson, and whether Mr. Wilson would be responsible directly to the plaintiffs for this money, or whether he was only to stand in the relation of a sort of trustee for them, and to give them the money whenever he should get it from the English company; and, so far as I can

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see in the evidence, there is nothing very explicit upon that subject, as to any understanding or agreement between them, unless it may be what occurred in Chicago in February, 1884, about the time these parties were coming over to look at the property."

The instruction so complained of contains no proposition of law, and merely calls the jury's attention to the matter of fact in controversy, and to the absence of anything explicit in the evidence on the subject. This instruction could have worked no prejudice to the defendant, because the amount of the verdict shows that the jury did not allow any part of the plaintiff's claim based on a sale for an amount in excess of $225,000, and their answer to the special inquiry of the court also shows that they failed to do so. The contention of the defendant that he never received anything in excess of $225,000, therefore, was adopted by the jury. Furthermore, the court subsequently instructed the jury that, if there was any sum to be paid after the defendant should have received $225,000, and only any such amount over that sum as he should receive, he could not be liable for that, because he had not yet received it.

The next alleged error is in the following instruction to the jury: "I think Mr. Everett says that then there was an express understanding he was not only to have fifty thousand dollars, which was in the understanding and agreement of the parties up to that time, but that he was to have ten thousand more, and five thousand more, making sixty-five thousand in all, and that this was all to be paid by Mr. Wilson if the contract should go on. I believe Mr. Wilson denies this." This is only a correct statement of what the respective parties claimed, as the court understood the case, and there was no intimation by it as to whether one claim or the other was sustained by the evidence. The court further on, at the request of the defendant, stated to the jury that the weight of the evidence, as to whether one witness or another should be accepted, was for their consideration, and said: "The force and strength of the evidence is entirely as it shall stand with you and affect your judgment."

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The third alleged error is that the court instructed the jury as follows: "Now, the question is what you can gather from all that took place between them in the way of an agreement on the part of Mr. Wilson to pay these parties for their services. Was there any agreement to pay them for their services; and, if so, how much and when was he to pay — upon the completion of these contracts, after they were executed — some part — and, if so, how much, and more, if it should be received from the English company; and, if so, how much? If his liability was contingent upon receiving the money from the English company it must be said that he has not received it — that is to say, parties have paid in money only the sixty-three thousand eight hundred and fifty dollars and some twenty-odd thousand dollars received from the sale of cattle, which is to be counted as payment, and then what was got under the sale of the chattel mortgage." We perceive no error in this instruction.

The fourth alleged error is in instructing the jury as follows: "If there was another and a different sum and a larger sum to be paid only when it should be received from the English company in excess of the sum of two hundred and twenty-five thousand dollars, then he cannot be liable for that, because he has not received that sum from the English company. I think that ought to make plain to you the grounds upon which you ought to proceed in arriving at a verdict in this case. If you find from the evidence that any sum was due to these plaintiffs upon the completion of this contract with this company — and by its completion I mean when it was executed and the property was passed over, and so on, delivered to the English company — then the plaintiffs are entitled to that. If there was any sum to be paid after Mr. Wilson should have received two hundred and twenty-five thousand dollars, and only any such amount over that sum as he should receive from the English company, then he cannot be liable for that, because he has not yet received it." We cannot see any error in this instruction.

All the instructions complained of in these assignments of error, except the second, involve only the matter of the surplus

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over $225,000, and, as it clearly appears that that portion of the plaintiff's claim was disallowed, there could have been no prejudice to the defendant.

The principal ground of complaint by the defendant seems to be that the jury had no basis for finding a verdict for $10,000, but that their verdict should have been for either $5000 or $15,000. But this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury, if there were one. Nor can we take cognizance of the complaint that the court overruled the motion for a new trial, or that the verdict of the jury was contrary to law and not warranted by the testimony. The case was fairly submitted to the jury, and the issues involved were passed upon by them.

As a supersedeas bond was given in this case, and thus the writ of error has delayed the proceedings on the judgment, and as it appears to us to have been sued out merely for delay, we award damages on the amount of the judgment at the rate of ten per centum, in addition to interest. Rev. Stat. § 1010; Rule 23, subd. 2; *Amory* v. *Amory*, 91 U. S. 356.

Judgment affirmed, with 10 per cent damages, in addition to interest.

NATAL v. LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 271. Argued and submitted March 30, 1891. — Decided April 13, 1891.

An ordinance passed by the city of New Orleans, under authority conferred by the legislature of Louisiana, prohibiting the keeping of any private market within six squares of any public market of the city, under penalty of being sentenced, upon conviction before a magistrate, to pay a fine of twenty-five dollars, and to be imprisoned for not more than thirty days if the fine is not paid, does not violate the Fourteenth Amendment of the Constitution of the United States.

THE case is stated in the opinion.

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Mr. West Steever (with whom was *Mr. J. Hale Sypher* on the brief) for plaintiffs in error.

Mr. Carleton Hunt for defendant in error submitted on his brief.

MR. JUSTICE GRAY delivered the opinion of the court.

The plaintiffs in error were severally complained of, tried, convicted and sentenced in a recorder's court in the city of New Orleans for keeping a private market within six squares of a public market, in violation of § 4 of an ordinance of the city, copied in the margin,[1] and passed under the authority conferred by the statute of Louisiana of 1878, c. 100, as follows:

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[1] ORDINANCE 4778.

1. That private markets for the sale of meats, fish, vegetables, fruit and other comestibles may be opened and kept in any portion of the city of New Orleans, not within a radius of six squares of any public market of said city: Provided, the proprietor of said market pays the license provided therefor, and otherwise complies with the provisions of this ordinance and other ordinances relating to the same subject matter.

2. That all private markets shall be kept in the lower story of the building in which they are opened. They shall be thoroughly washed and cleansed daily, and no meats or other comestibles shall be exposed on the banquettes. They shall be closed punctually at twelve o'clock meridian of every day. For any violation of any of the provisions of this section, the person offending shall be liable to a fine of not less than five nor more than twenty-five dollars, to be imposed and collected by the recorder of the district in which the said market may be situated. In default of the payment of each and every fine so imposed, the person so defaulting shall be subjected to imprisonment for a time not to exceed thirty days nor less than five days.

3. That the administrator of commerce shall have full authority by himself or deputy to inspect all private markets at any hour when they may be open for business, and any refusal by any proprietor of a private market to permit such inspection shall render him liable to a fine to be imposed and collected as provided in the preceding section.

4. That no private market shall be permitted within a radius of six blocks of any public market of the city, as per plan on file in the office of the administrator of commerce, designating and specifying the same, and making part of this ordinance; and it shall be the duty of the chief of police, under the direction of the administrator of commerce, to cause any private market opened in violation of the provisions of this section to be

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"Sec. 2. That the city council of the city of New Orleans be and they are hereby authorized and empowered to make such arrangements and pass such ordinances for the government and regulation of the private markets in the city of New Orleans as they in their discretion may deem proper, and that they be vested with full power to provide for the enforcement of their said ordinances: Provided, the city council shall not have the power to prohibit the existence of private markets under proper regulations.

"Sec. 3. That the said city council may prescribe by ordinance the manner in which such private markets shall be kept, the portion of the city in which they shall be located, and the distance which they shall be removed from the public markets, and shall have power to provide for the enforcement of said ordinances; provided, no private market shall be established within a radius of six squares of any public market."

The cases were consolidated, and on appeal to the Supreme Court of the State the judgments were affirmed. 39 La. Ann. 439.

The plaintiffs in error contended in the recorder's court, and afterwards assigned for error, that their privileges and immunities as citizens of the United States had been abridged, and that they had been deprived of liberty and property without due process of law, and had been denied the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

The case is too plain for discussion. By the law of Louis-

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closed; and any person opening a private market in violation of the provisions of this section, and within the said prohibited distance, shall be liable to a fine of twenty-five dollars for each and every offence, said fine to be imposed and collected by the recorder of the district in which said private market may be situated. In default of the payment of each and every fine so imposed, the person so defaulting shall be subject to imprisonment for a term not to exceed thirty days or less than five days.

5. That any person or persons applying to the administrator of finance for a license to keep a private market shall, before obtaining said license, produce a certificate from the administrator of commerce, showing the location of said private market, and that all the requirements of this ordinance have been complied with by the person or persons asking a license.

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iana, as in States where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as in its discretion the public health and convenience may require. *Morano* v. *Mayor*, 2 La. 217; *First Municipality* v. *Cutting*, 4 La. Ann. 335; *New Orleans* v. *Stafford*, 27 La. Ann. 417; *Bush* v. *Seabury*, 8 Johns. 419; *Buffalo* v. *Webster*, 10 Wend. 99; *Nightingale's Case*, 11 Pick. 168; *Commonwealth* v. *Rice*, 9 Met. 253. The ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the legislature of the State. A breach of such an ordinance is one of those petty offences against municipal regulations of police, which in Louisiana, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. Louisiana Constitution of 1852, arts. 103, 124; Constitution of 1868, arts. 6, 94; *State* v. *Gutierrez*, 15 La. Ann. 190; *Mayor &c. of Monroe* v. *Meuer*, 35 La. Ann. 1192; *Callan* v. *Wilson*, 127 U. S. 540, 553, 555.

Judgment affirmed.

MASON *v.* ROBERTSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 277. Argued April 1, 1891. — Decided April 13, 1891.

Under the act of March 3, 1883, c. 121, § 6, bichromate of soda is subject to the duty of twenty-five per cent ad valorem, imposed by Schedule A upon "all chemical compounds and salts, by whatever name known;" and is not subject, by virtue of the similitude clause, to the duty of three cents per pound, imposed by that schedule on bichromate of potash.

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Statement of the Case.

THIS was an action by importers against a former collector of the port of New York to recover back duties of three cents a pound, exacted by the defendant in 1885, and paid by the plaintiffs under protest, on thirty casks of bichromate of soda, weighing 17,227 pounds, and valued at 3325 marks.

The provisions of the act of March 3, 1883, c. 121, § 6, relied on by either party, were as follows:

"SEC. 2499. There shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable."

"SEC. 2502. There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules respectively prescribed, namely:

"SCHEDULE A — CHEMICAL PRODUCTS."

"Bichromate of potash, three cents per pound."

"All preparations known as essential oils, expressed oils, distilled oils, rendered oils, alkalies, alkaloids and all combinations of any of the foregoing, and all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem." 22 Stat. 491, 493, 494.

At the trial it appeared that bichromate of soda was a chemical salt, composed of chromic acid and sodium, which, though long known to chemists, had come into commercial use

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since 1883; that it resembled in appearance bichromate of potash, which was composed of chromic acid and potassium; and that both were used to produce chrome yellow and other colors, although bichromate of soda was less soluble, and less valuable for producing some colors, than bichromate of potash.

The plaintiffs, in their protest, and at the trial, insisted that bichromate of soda was a chemical compound and salt, "not specially enumerated or provided for in this act," within the meaning of Schedule A, and was therefore dutiable under that schedule at twenty-five per cent ad valorem; and requested the judge to direct a verdict in their favor.

But the judge ruled, in accordance with the decision of the collector, that bichromate of soda was subject to a duty of three cents a pound under § 2499, as a "non-enumerated article," which bore a similitude, in the use to which it was applied, to bichromate of potash; declined to submit the question of similitude to the jury; and directed a verdict for the defendant. 29 Fed. Rep. 684. The plaintiff alleged exceptions, and sued out this writ of error.

Mr. Edward Hartley (with whom was *Mr. Walter H. Coleman* on the brief) for plaintiff in error.

Mr. Assistant Attorney General Parker for defendant in error.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

The ruling below was in accordance with decisions in other circuits. *Biddle* v. *Hartranft*, 29 Fed. Rep. 90; *Lloyd* v. *McWilliams*, 31 Fed. Rep. 261. But it appears to us to have proceeded upon an erroneous view of the statute, as applied to the case before the court.

The general scope of the similitude clause in the customs acts is defined in a recent judgment of this court, delivered by Mr. Justice Field, as follows: "To place articles among those designated as enumerated, it is not necessary that they should be specifically mentioned. It is sufficient that they are

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designated in any way to distinguish them from other articles. Thus, the words 'manufactures of which steel is a component part,' and 'manufactures of which glass is a component part,' have been held a sufficient designation to render the goods enumerated articles under the statute, and take them out of the similitude clause. *Arthur* v. *Sussfield*, 96 U. S. 128. Upon the same principle, 'manufactures of hair' must be held a sufficient designation to place such manufactures among the enumerated articles." *Arthur* v. *Butterfield*, 125 U. S. 70, 76, 77. So the description, "manufactures composed wholly of cotton," or even "manufactures of cotton," has been held to be a sufficient enumeration. *Stuart* v. *Maxwell*, 16 How. 150; *Fisk* v. *Arthur*, 103 U. S. 431. See also *Hartranft* v. *Meyer*, 135 U. S. 237.

In the customs act of 1883, Schedule A, entitled "Chemical Products," besides defining the duties on more than a hundred kinds of such products, makes the duty on "all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem." The designation, "all chemical compounds and salts, by whatever name known," includes all chemical compounds and chemical salts, used then or thereafter in any science or art, as clearly as if the proper names of each and all of them had been given. Bichromate of soda, being undoubtedly a chemical compound and a chemical salt, is within the very words of the schedule, and cannot therefore be treated as a non-enumerated article, within the similitude clause. The manifest intent of Congress was that every kind of chemical compound and of chemical salt, by whatever name known, should have a fixed rate of duty, to be ascertained quickly and easily by the schedule of chemical products, without entering upon a comparison, under the similitude clause, of "material, quality, texture or the use to which it may be applied," which, though affording a convenient and valuable test as applied to many articles of manufacture, would often be found difficult of application to chemical products, without such scientific knowledge and investigation as could not be expected of custom-house officers.

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It was argued for the United States that this conclusion would be inconsistent with the decisions in *Stuart* v. *Maxwell*, 16 How. 150, and in *Arthur* v. *Fox*, 108 U. S. 125. But we cannot perceive any such inconsistency. In neither of those cases was there any question between the similitude clause and a clause specially enumerating, describing or designating a particular class of goods. In *Stuart* v. *Maxwell*, the question was between the similitude clause and a general clause covering "all goods, wares and merchandise, imported from foreign countries, and not specially provided for in this act." Act of July 30, 1846, c. 74, § 3; 9 Stat. 43. In *Arthur* v. *Fox*, the question was between successive sentences of the similitude clause itself, as applied to an article admitted not to be enumerated.

Judgment reversed, and case remanded with directions to set aside the verdict, and to take further proceedings in conformity with this opinion.

BOCK *v.* PERKINS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 285. Argued April 2, 3, 1891. — Decided April 13, 1891.

A marshal of the United States, or his deputies, being sued in trespass for seizing particular property under an attachment, to him directed, and defending upon the ground that the property, so seized, belonged to the defendant named in the writ of attachment, may have the case — the amount in dispute being sufficient — removed to the proper Circuit Court of the United States, as one arising under the laws of the United States.

A deed of assignment for the benefit of creditors, recited the indebtedness of the assignor, his inability to pay his debts with punctuality or in full, and his desire to make "a fair and equitable distribution of his property among all his creditors," and provided that the assignor "has bargained, sold and assigned, and does hereby grant, convey and assign," unto the assignee "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Sched-

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ule A, or intended so to be. . . . Schedule B, hereto annexed, contains, as near as I can state, a list of all my creditors and the amount of their respective demands, and both of said Schedules A and B are hereby made part of this assignment." Schedule A, annexed to the assignment, contained an inventory of certain real estate, and a list of persons indebted to the assignor, and was verified by his oath to the effect that it contained a true list of the assignor's creditors and the amount of their respective demands. But it contained no clause or provision which, by any construction, embraced a stock of goods worth about $10,000, and constituting, at the time, the bulk of the assignor's estate. *Held*, That the title to these goods did not pass to the assignee, and remained subject to attachment as the property of the assignor. The general description in the assignment of the property conveyed is limited by the particular description immediately following in the same clause referring to Schedule A.

The statutes of Iowa relating to assignments for the benefit of creditors refer to *general* assignments, by which the assignor makes a disposition of all his property for the benefit of all his creditors. They do not relate to partial assignments which are permissible under the laws of that State.

THE case is stated in the opinion.

Mr. D. E. Lyon for plaintiff in error. *Mr. H. B. Fouke* was with him on the brief.

Mr. Francis B. Daniels and *Mr. Louis G. Hurd* for defendants in error. *Mr. David B. Henderson* was with them on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action involves the title to a certain stock of goods seized under attachments sued out against the property of H. P. Lane from the Circuit Court of the United States for the Northern District of Iowa, and directed to the marshal of that district for execution. The goods, when seized, were in the possession of the plaintiff in error, who claimed the right to hold them under an assignment made to him by Lane before the attachments were issued. Bock seeks to recover from Perkins, the marshal, and from Thrift and Hopkins, his deputies, damages in the sum of ten thousand dollars for their seizure. The defence was, that the goods were the property of Lane at

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the time of the seizure, and, therefore, were liable to be taken under the attachments. Upon the petition of the defendants, accompanied by a proper bond, and an affidavit setting forth the nature of the defence, the case was removed into the court below for trial as one arising under the laws of the United States. The plaintiff moved to remand it to the state court. The motion was denied, and by direction of the court the jury returned a verdict for the defendants. A judgment in their favor was accordingly entered. *Bock* v. *Perkins*, 28 Fed. Rep. 123.

The court below properly retained the case for trial. Every marshal of the United States, as well as his deputy, must take an oath or affirmation that he will faithfully execute all lawful precepts directed to him, and in all things well and truly perform the duties of his office. The marshal must also give bond, with sureties, for the faithful performance of the duties of his office by himself and deputies. And marshals and their deputies have, in the respective States, the same powers in executing the laws of the United States as sheriffs and their deputies have in executing the laws of such States. Rev. Stat. §§ 782, 783, 788. A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States, is one arising under the laws of the United States; for, as this court has said, "cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted." *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141. If the goods in question, when seized, were the property of Lane, the marshal and his deputies were in the discharge of duties imposed upon them by the laws of the United States; and for any failure in that regard he would be liable to suit by any one thereby injured. Rev. Stat. § 784. This case was, therefore, one arising under the laws of the United States, and removable from the state court. *Feibelman* v. *Packard*, 109 U. S. 421, 423; *Bachrack* v. *Norton*, 132 U. S.

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337; *Reagan* v. *Aiken*, 138 U. S. 109; *Houser* v. *Clayton*, 3 Woods, 273; *Ellis* v. *Norton*, 16 Fed. Rep. 4.

No different doctrine was announced in *Buck* v. *Colbath*, 3 Wall. 334. On the contrary, that case sustains the view we have just expressed. Colbath sued Buck in a state court in trespass for taking his goods, the latter pleading simply that he was marshal of the United States, and had seized the goods under an attachment against the property of certain parties named therein, but not averring that the goods belonged to the defendants named in the writ. This court, upon error to the highest court of the State, held that the marshal was guilty of trespass in levying upon the property of one against whom the writ did not run, and could be sued therefor in a state court — the *mere* fact that the writ issued from a Federal court constituting no defence. The judgment in that case against the marshal was reviewed here under the act of Congress authorizing such review in cases where a party specially claimed the protection of an authority exercised under the United States, and the decision withheld the protection so claimed. The decision sustains the proposition that where a marshal, being sued in trespass in a state court for taking property under a writ of attachment to him directed, defends upon the ground that the property attached belonged to the defendant named in the writ, the case is one arising under the laws of the United States, and therefore removable.

We come now to the principal question in the case. The plaintiff claims title to the goods attached under an instrument of writing, executed on the day it bears date, as follows:

"This indenture, made the 20th day of November, A.D. 1884, between Henry P. Lane, of New Albin, Allamakee County, and State of Iowa, of the first part, and Wm. O. Bock, of said county and State, of the second part:

"Whereas the said Henry P. Lane is justly indebted in considerable sums of money, and has become unable to pay the same with punctuality or in full, and is now desirous of making a fair and equitable distribution of his property among all his creditors, now this indenture witnesseth: That the said party

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of the first part, in consideration of the premises and of the sum of one dollar to him paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and assigned, and does hereby grant, convey and assign, unto the said party of the second part and to his assigns forever, all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule 'A,' or intended so to be, upon the following trusts, viz.: To take possession of said lands and property and sell said lands, unless otherwise directed by the Circuit Court of Allamakee County, State of Iowa, on notice published as in cases of sales of real estate on execution, and dispose of said personal property upon such terms as in his judgment may appear best, but not on credit, and hold the proceeds of sales of all said lands and personal property for distribution among all the creditors of said party of the first part, in accordance to such orders and directions as may from time to time be made by said Circuit Court, and shall, after final settlement and distribution be made, and all the reasonable expenses, rents, taxes, assessments, commissions and allowances are paid, return any surplus there may be of the proceeds of the sales of the assigned property to the party of the first part or his assigns; also to reconvey and reassign, to him or them any real or personal property remaining unsold. Schedule B, hereto annexed, contains, as near as I can state, a list of all my creditors and the amount of their respective demands, and both of said schedules A and B are hereby made part of this assignment. Witness my hand the day and year first above written.

"In presence of — HENRY P. LANE.

"SAM'L H. KINNE."

Bock, on the same day, accepted the trust created by this instrument and agreed to execute its provisions.

Schedule A, annexed to and made part of the assignment, contained an inventory of certain real estate, and a list of the names of about one hundred and fifty persons indebted to the

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assignor; but no mention was made in it of the stock of goods in question. It was verified by his oath to the effect that, according to the best of his knowledge, it contained a true statement and account of his estate, both real and personal. Schedule B, also annexed to and made part of the assignment, contained a list of the assignor's creditors, about fifty in number, with the amount of their respective demands. It was verified by Lane's oath to the effect that it contained a true list of all his creditors and the amount of their respective demands.

Lane was engaged in mercantile business at New Albin, Allamakee County, Iowa, when the assignment was made, and owned the goods alleged to have been wrongfully taken under the attachments. After the assignment was executed and acknowledged, Bock took possession of them. He caused an inventory to be made and put the assignment on record before the attachments were levied. At the time of the assignment he was in Lane's employment and had charge of his mercantile business.

The court charged the jury that as the goods in question were not enumerated or described in the schedule annexed to and made part of the assignment, and could not by any construction of its clauses be included in it, the title did not pass to Bock, and they were rightfully attached as the property of Lane. It also held that the defendants were entitled to a verdict upon the further ground that, if the instrument were treated as a general assignment under the statutes of Iowa regulating assignments for the benefit of creditors, it was void because, when taken in connection with certain conveyances executed about the same time by the assignor for the benefit of his wife and wards — all the instruments constituting, in the judgment of the court, one transaction — it gave a preference to some creditors over others, in violation of the statute, and for that reason was void. *Van Patten* v. *Burr*, 52 Iowa, 518, 521.

Did Lane's stock of goods pass to Bock by the assignment of November 20, 1884? If not, they were rightfully attached as his property. Although Lane, in the assignment, expressed

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his inability to pay his debts with punctuality or in full, as well as the desire to make a fair and equitable distribution of "his property among all his creditors," and although the first part of the granting clause embraces "all the lands and all the personal property of every name and nature whatsoever" of the assignor, the property bargained, sold and assigned is stated in the words immediately following, in the second part of the same clause, to be that "more particularly enumerated and described in the schedule, hereto annexed, marked Schedule A, or intended so to be;" which schedule, together with Schedule B, is made, by express words, part of the assignment. The schedule which thus particularly enumerated and described the property conveyed is, therefore, as much a part of the assignment as if it were embodied in it, word for word. In that view, the general description in the first part of the granting clause must be held to be limited by the words which immediately follow, indicating that the property, real and personal, intended to be conveyed, was enumerated in the schedule annexed. The particular description must control the previous general description in the same clause, although the words "general assignment" are at the head of the instrument. Nor is the result affected by the words "or intended so to be," following the words "Schedule A;" for what was intended must be determined by reference to the schedule, which is expressly stated, in the instrument of assignment, to contain a description of the property which was assigned to Bock. This interpretation is said to be inconsistent with the purpose of the assignor, avowed in the assignment, to make a fair and equitable distribution of his property among all his creditors. But this language must be taken in connection with other parts of the instrument, showing that the distribution proposed had reference only to the property particularly enumerated in the schedule. We must assume that Lane did not verify Schedule A by his oath, without reading or understanding what it contained. While, by accident or inadvertence, he might have omitted from it property of trifling value, it is unreasonable to suppose that the omission from the schedule, declared to contain a more particular enumeration

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and description of the property assigned, of his stock of goods worth nearly $10,000, and constituting the bulk of his estate, was by inadvertence. Bock was present when the schedules were prepared, and it cannot be that he and Lane both were unaware of the fact that Schedule A contained nothing which, by any possible construction, could include the goods in Lane's store. Why these goods were omitted from Schedule A would be a matter of mere conjecture. The probability is, that the assignment and schedule were not prepared at the same time, and that the conclusion ultimately reached by Lane was to make only a partial assignment, which was permissible under the laws of Iowa, and, through Bock, his clerk and assignee, retain control of the goods in the store without subjecting the latter to responsibility to creditors for their management; for, by the terms of the assignment, the assignee would only be liable to them for the proper management and distribution of the property enumerated and described in Schedule A, made part of the assignment. Be this as it may, and without saying that the intention of the parties could be ascertained by parol evidence or otherwise than from the assignment itself, we are of opinion that the better and safer construction is, that the general words in the first part of the granting clause are limited by the particular description in the latter part of the same clause of the property actually conveyed to the assignee. These views are sustained by the weight of authority. And we are referred to no decision of the Supreme Court of Iowa to the contrary. So that whether the property in question passed to Bock, by virtue of the assignment, is to be determined by the general rules governing the interpretation of written instruments, the controlling one of which is that effect must be given to the intention of the parties as disclosed by the instrument to be construed.

It will be well to refer to some of the adjudged cases. A leading one upon the subject is *Wilkes* v. *Ferris*, 5 Johns. 335, 345, in which an assignment for the benefit of creditors conveyed "all the goods, property, wares, merchandises, chattels, vessels, debts, sum and sums of money, claims and demands and effects, belonging to, and now due and owing to, the said

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Henry Cheriot, or to which, and in which, he has any right, property, claim or demand, which said goods, wares and merchandises, hereby granted and sold, are particularly described and enumerated in the Schedule A, signed by the said Henry Cheriot, and to these presents annexed, etc." It was contended that the assignment was broad enough to embrace any article not contained in the schedule. But the court said: "This was not, in fact, a general assignment of *all Cheriot's* estate; for though the words, in one place, be general, yet the assignment immediately goes on to specify, by a reference to the schedules annexed, the specific articles of property assigned; and it therefore could operate only upon the articles specified; for, as the court said in *Munro* v. *Alaire*, 2 Caines, 327, [Chief Justice Kent delivering the opinion,] if a general clause be followed by special words, which accord with the general clause, the deed shall be construed according to the special matter." This case has been often cited with approval. In *Driscoll* v. *Fiske*, 21 Pick. 503, 505, 507, the court construed an assignment made by partners in trust for the benefit of their creditors, who should become parties to it, of "all their books, stock in trade, printing apparatus and machinery, books of account, book debts, notes and demands and all their other property of every name and nature, except such as is exempt from attachment, most of the same being now at their place of business, a schedule of which is annexed, and other and fuller schedules of the property hereby assigned shall be hereunto annexed as soon as the same can be conveniently made." The schedule contained three items, namely, "stock of books in store — printing presses and materials — notes and demands, etc." A creditor subsequently attached certain furniture remaining in the possession of one of the partners, after which the assignees inserted it in the schedule. The furniture was held subject to the attachment. The court said: "The general phraseology in the assignment is sufficient to include the furniture which is in question. The conveyance of certain property specified, and of all other property of every name and nature except such as is exempt from attachment, might well be construed to mean all the property which the assignors

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had jointly or each of them had severally. But we are to take the whole instrument into consideration, in order to ascertain the true intent and meaning of the parties. . . . The general words are restrained by reference to the schedules which were annexed before the attachment was made. So that the assignment, independently of the parol evidence, cannot by fair construction be said to include the furniture of the individual assignors. *Wilkes* v. *Ferris*, 5 Johns. 335." In the same case it was held that parol evidence that it was intended to include the furniture in the conveyance, tended to contradict, not explain, the writing, and was inadmissible. See also *Tucker* v. *Clisby*, 12 Pick. 22.

In *Mims* v. *Armstrong*, 31 Maryland, 87, the precise question here presented was decided. The deed of assignment for the benefit of creditors in that case declared that the assignor was "indebted to divers persons in divers sums of money, which, by reason of sundry losses and misfortunes, he has become unable to pay in full, and is desirous of providing for the payment thereof, as far as he can, in a just and equitable manner, by assignment of all his property and effects for the purpose;" and it conveyed "all and singular his goods, chattels, promissory notes, debts, wares, merchandise, securities and vouchers, for and affecting the payment of money, claims, demands, choses in action and property of every name and nature whatever, of and belonging to him, and which are more particularly and fully enumerated in the schedule hereto annexed, marked Schedule 'A.'" The assignee sought to recover certain money, not named in the schedule annexed to the assignment, and which had been appropriated by particular creditors of the assignors to their own use. The court, holding that the money did not pass by the assignment, said: "In the grant before us the general descriptive words employed would certainly be sufficient, in the absence of any restrictive clause, to pass all the debtor's property; but we must suppose that the grantor had a purpose in the more particular description which he thought proper to give in the schedule, and that that purpose was what he declares it to be, a more particular and full description of the property conveyed. To withhold this meaning from the

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words of reference to the schedule is to deny to them all import whatever; and that is justified by no rule of construction. If instead of referring to the schedule for a particular description of the property, the grantor had followed the general description with such words as namely, that is to say, or, as follows, and set out in the body of the assignment itself the items enumerated in the schedule, there could hardly have been a doubt but that the preceding general words of description would have been restrained and confined to the subsequent enumeration. And if that be so, how does the fact that the schedule, instead of being incorporated in the body of the deed, is on a separate sheet of paper annexed thereto, change in any manner the application of the principle? For, the schedule being a part of the deed, we should read it as if inserted in the body of that instrument."

The above cases, in our judgment, rest upon sound rules of interpretation. To the same effect are *United States* v. *Langton &c.*, 5 Mason, 280, 288; *Guerin* v. *Hunt*, 6 Minnesota, 375; *Wood* v. *Rowcliffe*, 5 Eng. Law & Eq. 471; *McAlpine* v. *Foley*, 34 Minnesota, 251; *Rundlett* v. *Dole*, 10 N. H. 458; *Belding* v. *Frankland*, 8 Lea (Tenn.), 67; and *Scott* v. *Coleman*, 5 Littell, 349. See also Burrill on Assignments, 5th ed. pp. 192 to 198.

Numerous authorities are cited for the plaintiff which are supposed to announce a contrary doctrine. Most of them, however, will be found, upon careful examination, to proceed upon the peculiar wording of the instruments construed. Among these cases is *Bank of Tennessee* v. *Horn*, 17 How. 157, 159, 160, where the question was whether a certain lot was embraced in a cession made for the benefit of creditors under a statute of Louisiana, approved March 26, 1826, relating to the voluntary surrender of property by insolvent persons. Laws of La. 1826, p. 136. That case does not bear upon the question here, for the court held it to be apparent that the lot in question was intended to be included in the debtor's schedule, but was imperfectly and erroneously described in it; and by the local statute, all the property of an insolvent petitioner, mentioned in his schedule, was fully

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vested in creditors from and after the cession and acceptance — the duty of the syndic being to take possession of it, and to administer and sell for benefit of the creditors. "Consequently," Chief Justice Taney said, "if, under the ambiguous or erroneous description in the schedule, this lot must be regarded as omitted, it still passed by the cession." That was not, then, a case of property being omitted altogether from a schedule, made part of an assignment, and describing the property assigned. Equally inapplicable is the case of *National Bank* v. *Bank of Chicago*, 94 Illinois, 271, 279, where the question was whether the claim of a particular bank was included in a deed of assignment for the benefit of creditors, which, after providing that the assignee should, out of the proceeds of the trust property, if sufficient, pay all the debts due "to the parties severally named in the schedule of creditors, to be hereunto annexed," added, "it being intended to include in said schedule the names of all the creditors of the party of the first part, with the amount due to each of said creditors." The bank referred to was not named in the schedule subsequently prepared and annexed, but the court held that it was not excluded from participation in the assets; observing, that the language last above quoted would not have been used if the purpose had been to exclude some creditors from the list to be subsequently made and incorporated in the schedule. It requires no argument to show that this decision has no application to the case before us. In support of the plaintiff's position reference was also made to *Platt* v. *Lott*, 17 N. Y. 478, and *Turner* v. *Jaycox*, 40 N. Y. 470. But of these cases it was said in *Holmes* v. *Hubbard*, 60 N. Y. 183, 185, that the instruments construed in them were general assignments of all the property and effects of the assignors for the payment of all their debts. And, in the later case of *Emigrant Industrial Savings Bank* v. *Roche*, 93 N. Y. 374, 378, it was said that "it is a rule for the construction of all written instruments conveying property, that if a general clause be followed by special words, the instrument shall be construed according to the special matter; and in the application of this rule it is held that the general words of an assign-

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ment should be restricted by a subsequent clause referring to a schedule annexed for a more full description;" citing *Wilkes* v. *Ferris* and *Holmes* v. *Hubbard*, above cited. Similar criticism could be made upon other authorities relied upon by the plaintiff. But it is unnecessary to extend this opinion by an examination of them.

The plaintiff lays stress upon the Iowa statute relating to assignments for creditors in force when Lane's assignment was made. That statute provides that "no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims;" that "the debtor shall annex to such assignment an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and also a list of his creditors and the amount of their respective demands; but such inventory shall not be conclusive [as] to the amount of the debtor's estate; and such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment; . . ." that "the assignee shall at all times be subject to the order and supervision of the court or judge, and the said court or judge may, by citation and attachment, compel the assignee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this chapter;" that "no assignment shall be declared fraudulent and void for want of any list or inventory as provided in this chapter;" and that "the court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may then and there be inquired of him, and such debtor may then and there be fully examined under oath as to the amount and situation of his estate, and the names of the creditors and amounts due to each, with their places of residence; and may compel the delivery to the assignee of any property or estate embraced in the assignment." 1 McClain's Ann. Stat. Iowa

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(ed. 1880), 592, §§ 2115, 2117, 2123, 2124; (ed. 1888), §§ 3292, 3294, 3302, 3303, p. 849.

We do not perceive that these statutory provisions determine the question before us. In the event of a *general* assignment of property, by one insolvent or in contemplation of insolvency, for the benefit of creditors, the debtor is required to annex to the assignment an inventory of his estate, and the assignment is not invalidated or rendered void for the want of such an inventory. Whatever estate belongs to the debtor, at the time of a general assignment, passes, by force of the statute, to the assignee. The transaction contemplated in the Iowa statute, and termed a general assignment, "is a disposition of *all* the property of the insolvent for the benefit of all his creditors." *Van Patten* v. *Burr*, 52 Iowa, 518, 521. But the assignment in question here was not a general assignment. It was only a partial one. The debtor assigned, and from the terms employed by him could have intended to assign, only the property particularly enumerated and described in the schedule annexed to the instrument that passed the title. The plaintiff concedes that partial assignments are permissible under the statutes of Iowa. *Lampson* v. *Arnold*, 19 Iowa, 479, 486. The statutory provisions just referred to have reference only to general assignments.

For the reasons given we are of opinion that the court did not err in holding that the goods attached did not pass to Bock by the assignment in question, and were subject to the writs that came to the hands of the defendants. And the jury were properly instructed to find for the defendants.

This disposes of the case without the necessity of considering whether the assignment, if regarded as a general assignment of the debtor's property, was or was not void under the statutes of Iowa.

Judgment affirmed.

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SANFORD *v.* SANFORD.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 275. Submitted March 30, 1891. — Decided April 13, 1891.

In May, 1871, one S settled upon unsurveyed public lands in Oregon, as an intending preëmptor. In September following he induced his brother to remove from California and make like settlement on adjoining unsurveyed lands and assisted him in building and making other improvements thereon. After official survey and filing of plat thereof in the local land office, each filed a preëmption declaration for the land severally occupied by them. Shortly thereafter, and upon *ex parte* affidavits falsely averring his own residence and occupation thereon, S was granted permission by the Commissioner of the General Land Office to change his preëmption declaration so as to include the land claimed and occupied by his brother, who, as shown by the findings, was a qualified preëmptor, in actual occupation, with substantial improvements. After issue of patent to S for the land embraced in his amended declaration, he brought ejectment against his brother for possession. The latter thereupon invoked the aid of a court of equity to enjoin S from prosecuting his action of ejectment; to declare the latter trustee of the property and to compel transfer thereof to him. In such action, *Held*,

(1) That while the determination of the land department in a matter cognizable by it in the alienation of lands under the laws of the United States cannot be collaterally impeached, when its enforcement is sought, — where the matter determined is not properly before the department, or its conclusion has been reached from a misconstruction of the law applicable to the case, and it has thus denied to a party rights which upon a correct construction would have been conceded to him, or where misrepresentation and fraud have been practised necessarily affecting its judgment, a court of equity in a proper proceeding will interfere and control its determination so as to secure the just rights of the party injuriously affected. The party acquiring the property under the circumstances mentioned will be charged as a trustee of the rightful owner and be compelled to transfer the property to him.

(2) By section 2261 of the Revised Statutes, and in consonance with the established practice of the land department thereunder, but one preëmption declaration is permitted. The statutory prohibition against a second declaration is unqualified, and applies in all cases, except where a prior claim has prevented the completion of the original entry, or a mistake in the original declaration has occurred without the knowledge or any fault of the claimant.

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Statement of the Case.

(3) The tract applied for in the second declaration need not be an entirely separate and distinct parcel to call into effect the prohibition; it is enough if there be such addition to the original land applied for as to justify the designation of it with the addition as a different tract.

(4) The Commissioner of the General Land Office having no authority to allow an amendment by a preëmptioner of his original declaration so as to cover a different tract, the land department acquires by such amendment no jurisdiction to award the additional tract to the claimant. Its action upon such additional tract will not defeat the rights of the occupant thereof.

THIS is a suit in equity between two brothers, whose last name is Sanford, and whose first names are not in the record, but only their initials, C. W. of the plaintiff below and H. W. of the defendant below.

The suit was brought to enjoin proceedings in an action of ejectment commenced by the defendant below, the plaintiff in error here, and to charge the latter as trustee of the property, and compel its transfer to the plaintiff. In the nomenclature of the Code of Oregon, regulating procedure in civil cases, it is termed a cross-bill. It sets forth with much particularity the several matters upon which relief is prayed, the averments respecting which are met by a general and specific denial in the answer of the defendant. A replication having been filed to this answer, the case, by consent of parties, was tried by the court. From its findings it appears, among other things, that in May, 1871, the defendant settled upon unsurveyed land of the United States in Coos County, Oregon, with the intention of taking up 160 acres of it as a preëmption claim, so soon as the same was surveyed; and that in September following, at his solicitation, his brother, the plaintiff below, moved from California, where he then resided, and settled upon adjoining lands, then unsurveyed, also with the intention of taking up the same as a preëmption claim when surveyed. Since then he has resided upon this adjoining land and cultivated and improved it. His settlement was made and the land was cultivated with the knowledge and at the request of the defendant, who pointed out the land to him and aided him in erecting buildings upon it, and in improving it in vari-

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ous other ways. In 1879 the land thus settled upon by the parties was surveyed by the United States, and an approved plat thereof was filed in the local land office in July of that year. On the 9th of September following the plaintiff filed a declaratory statement for the parcels occupied by him, as a preëmption claim; and on the 27th of the same month the defendant made a declaratory statement for those which he occupied. Neither of these claims interfered with the other, and except on one occasion, from the time of the settlement, no pretence had been made by either that he had any superior right to the land occupied by the other. Both recognized that they were ultimately to secure the parcels which they severally occupied as their respective preëmption claims, and with that understanding and knowledge the plaintiff had made valuable and lasting improvements upon the land on which he had settled.

On October 14, 1880, more than a year afterwards, the defendant was granted permission by the Commissioner of the General Land Office to amend his declaratory statement so as to include within it the parcels occupied by the plaintiff, which constitute the premises in controversy. This permission was procured upon *ex parte* affidavits of the defendant and two witnesses, without notice to the plaintiff of the proceeding. When they were filed the plaintiff had been, and was then, residing, as stated above, upon the land, which had never been occupied by the defendant. Pursuant to the permission the defendant amended his declaratory statement, and thus brought the premises before the land department as part of his preëmption claim, and was enabled to include them in the patent ultimately obtained by him, in fraud of the rights of the plaintiff. The court also found that at the time of his settlement upon the land in dispute the plaintiff was a qualified preëmptor; that he had made permanent improvements upon it, between January, 1872, and January, 1883, with the knowledge of the defendant, of the value of eighteen hundred dollars; that the affidavits upon which the defendant was allowed to amend his declaratory statement did not show that the plaintiff was in possession of the premises or had made any improve-

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ments thereon, but, on the contrary, falsely alleged that the house of the defendant and his improvements were situated thereon; and that thereby the Commissioner of the General Land Office was imposed upon and deceived, and induced to allow the defendant to amend his declaratory statement. And, as a conclusion of law, the court held that the plaintiff was entitled to a decree enjoining proceedings in the action of ejectment, and adjudging that the defendant held the legal title to the land in dispute in trust for him.

In conformity with this conclusion a decree was entered in favor of the plaintiff, and the defendant was required to convey the premises to him. On appeal to the Supreme Court of the State this decree was affirmed; and to review this decree of affirmance the case is brought, on a writ of error, to this court.

Mr. M. D. Brainard for plaintiff in error.

Mr. J. N. Dolph for defendant in error.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

By the Code of Oregon the findings of the court in an equity case of this kind are as conclusive as similar findings would be in an action at law. Hill's Annotated Laws of Oregon, sec. 397. They must therefore be taken as correct in the disposition of the question before us, they not having been set aside or qualified by any subsequent action of the court below. And upon them it is contended that the amendment to the declaratory statement of the defendant made in 1884, by which he was enabled to include within it the land in controversy, never occupied or improved by him, but at the time in the possession of the plaintiff, was in effect a second declaration of a preëmptive right to a different tract from the one originally claimed by him, and was allowed in disregard of the express prohibition of the statute, Rev. Stat. § 2261, or upon a plain misconstruction of its provisions, and gave no jurisdiction to the land department to treat the land thus in

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cluded as part of his preëmption claim, and that but for the amendment the land would have been awarded to the plaintiff.

It is objected to this contention that the question as to the defendant's right as a preëmption claimant to the land in controversy was a matter to be determined by the land department, where it was considered. It is true the determination of that department in matters cognizable by it, in the alienation of lands under the laws of the United States, cannot be collaterally impeached, where its enforcement is sought. In ejectment the question always is who has the legal title for the demanded premises, not who ought to have it. In such cases the patent of the government issued upon the direction of the land department is unassailable. But whilst the patentee holds the legal title his equitable relations to other parties are not thereby affected. That title, with important qualifications hereafter mentioned, is as much subject to control as the title to land held by him derived from private sources. If one takes a title in his own name, whilst acting as agent, trustee or guardian, or in any other fiduciary capacity, a court of equity will, upon a showing of the fact in an appropriate proceeding, subject the lands to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it. Nor does it matter whether the party takes the title in his own name in good faith, under the belief that he can thereby better manage the property to the advantage of those for whom he is acting, or in compliance with their wishes, or whether from an intention to defraud them of their rights therein. In either case a court of equity will control the legal title so as to protect the just rights of the true owner. *Townsend* v. *Greeley*, 5 Wall. 326, 335; *Estrada* v. *Murphy*, 19 California, 248. All this is but common knowledge, and the doctrine is constantly invoked for the protection of the rights of parties against the mistake, accident or fraud of agents or parties acting in a fiduciary capacity, and little difficulty is experienced in enforcing it, where the property held is not claimed under the adjudication of a court or other tribunal affirming the title of the holder; as, for instance, upon the determination of a department like that established

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to supervise proceedings for the alienation of the public lands. In these latter cases the action of a court of equity is limited so as not to interfere with the rightful exercise of the powers intrusted to the department. The conclusions of the department are not even then open to review for alleged errors in passing upon the weight of evidence presented, for that would be to make a court of equity a court of appeal from its decisions, which was never contemplated.

But where the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Baldwin* v. *Stark*, 107 U. S. 463, 465. In such cases a court of equity only exercises its ordinary jurisdiction to prevent injustice from a misconstruction of the law or the machinations of fraud.

The misconstruction referred to must be, as stated, of the law applicable to the case as established. Of this misconstruction we have an instance in *Silver* v. *Ladd*, 7 Wall. 219, where it was held by the Commissioner of the General Land Office and the Secretary of the Interior that the donation act of Oregon did not allow an unmarried woman to take as a settler, on the ground that she was not the head of a family. But this court decided that in this determination the officers misconstrued the law, and upon a bill in equity, filed by her son against subsequent patentees of the United States of the lands, held that relief should be afforded by directing a transfer of the title to him from such patentees.

And the misrepresentations and fraud mentioned necessarily affecting the judgment of the department, must be such as have prevented the unsuccessful party from fully presenting his case, or the officers of the government from fully considering it; such as have imposed upon its jurisdiction or turned.

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its attention from the real controversy. It must also appear that but for such imposition and fraud the determination would have been in favor of the plaintiff, and have entitled him to the patent for the land in dispute. *Lee* v. *Johnson*, 116 U. S. 49, 50; *Sparks* v. *Pierce*, 115 U. S. 408, 413; *Vance* v. *Burbank*, 101 U. S. 514, 519.

The case at bar, upon the facts found, is brought fully within the law as thus declared. The defendant in his original declaratory statement did not include the premises in controversy as part of his preëmption claim. It covered only adjoining land. Under the statute he could not make a second declaration for different property. Section 2261 of the Revised Statutes provides that "no person shall be entitled to more than one preëmption right by virtue of the provisions of section 2259; nor where a party has filed his declaration of intention to claim the benefit of such provisions for one tract of land, shall he file, at any future time, a second declaration for another tract." Section 2259 referred to designates who may be entitled to preëmption. The inhibition of section 2261 is positive and unconditional. The tract applied for in the second declaration need not be an entirely separate and distinct parcel to call into effect the prohibition; it is enough if there be such addition to the original land applied for as to justify the designation of it, with the addition, as a different tract. With the filing of the first declaration the applicant is limited to the land designated, whether less or different from what he supposed he could claim, or what he may subsequently desire to acquire. The prohibition of the statute is without qualification or exception, and the rights of the preëmptor must be measured by it. *Baldwin* v. *Stark*, 107 U. S. 463, 466. Such has been the uniform ruling of the land department, except where a prior claim has prevented the completion of the original entry, or a mistake in the first declaration has occurred without the knowledge or any fault of the claimant.

In the *Case of J. B. Raymond*, 2 Land Dec. 854, the claimant filed a declaratory statement in February, 1880, for a quarter section of land in Kansas, and in April, 1883, he applied to the local land office for permission to make a second

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filing for the same land, alleging as a reason therefor that he had made valuable improvements on his claim, but, having failed to raise any crops on account of the drought, was unable to pay for the land within the time prescribed by law. He, therefore, desired to file a second declaratory statement for the same land, for the better protection of his rights in the premises. The local land office rejected the application, and the Commissioner approved of the decision. Subsequently, the claimant asked permission to file another declaration for the same or other land, but it met with a similar rejection, and the case on both applications was brought before the Interior Department, where the decision of the Commissioner in both instances was affirmed. Mr. Teller, then Secretary, held that the claimant's application to file a new declaration for other land was properly denied upon the second clause of the statute, and that his application to file for the same land was properly denied upon the first clause, he having attempted to exercise the one preëmptive right which was alone permissible.

In *Allen* v. *Baird*, 6 Land Dec. 298, it appeared that Allen had made a declaratory statement for a tract of land as a preëmptor, in March, 1883, although he had made such declaration for another tract in August, 1880. It was sought to avoid the former filing upon the ground that at the date thereof he was not twenty-one years of age, and hence the filing was a nullity and no bar to a second one. The Commissioner held that the second filing was illegal, and upon appeal to the Interior Department his decision was affirmed. In disposing of the case, Mr. Lamar, then Secretary, after observing that Allen had stated in his first filing that he was over twenty-one years of age, when he knew the statement was untrue, and that, the land being subject to settlement and entry, he could not be heard to allege that the first filing was illegal, said: "The question of second filing was carefully considered by my predecessor, Secretary Teller, in the *Case of J. B. Raymond*, 2 Land Dec. 854, wherein it was held, that under the provision of section 2261, Revised Statutes, a preëmptor may file but one declaratory statement for land free to settle

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ment and entry. This ruling has been uniformly followed and the only exception is where the preëmptor is unable to perfect his entry on account of some prior claim, and there is no fault on his part." Reference is then made to other decisions of the department, and to the case of *Baldwin* v. *Stark*, cited above, where the positive and unconditional character of the inhibition of the statute is recognized by this court.

In allowing the defendant in this case to amend his declaratory statement, the commissioner of the General Land Office assumed a power which was not vested in him. No circumstances existed which prevented the first declaration from bringing into operation the express prohibition of the statute against a second one. The claimant knew perfectly the character and extent of the land originally claimed by him. He was at the time under no misapprehension on that subject. The commissioner, in allowing the amendment to cover a much larger tract than at first claimed, authorized a second declaration for a different tract, which was not permissible. If that officer was of the opinion that the statute did not apply to an amendment, thus enlarging the original declaration, he misconstrued its provisions. Without such enlargement, the premises in controversy would not have been brought before the land department as a part of the claim of the defendant, and no obstacle would have been presented to the award of a patent to the plaintiff for the land. By the amendment, therefore, the department acquired no more jurisdiction to award to the defendant the tract not embraced by his original declaration than it had to award to him any other tract never entered by him as a preëmptioner in the local land office. Its subsequent action upon the additional tract could not defeat the rights of the plaintiff to the premises.

Besides the want of authority in the commissioner to allow under the form of an amendment an enlargement of the preëmption claim, the manner in which that officer was imposed upon taints the transaction as one of fraud and misrepresentation on the part of the claimant, by which material facts were concealed from the department. A court of equity has jurisdiction in such a case to compel the transfer to the plaintiff of

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property which, but for such fraud and misrepresentation, would have been awarded to him, and of which he was thereby wrongfully deprived.

Decree affirmed.

DAVIS v. TEXAS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

No. 1593. Submitted March 30, 1891. — Decided April 13, 1891.

A writ of error to review the judgment of the highest tribunal of a State cannot be maintained in the absence of a Federal question giving this court jurisdiction.

The questions sought to be presented in this case as Federal questions fall entirely within the scope of the exercise of the powers of the State, and this court has no jurisdiction over them.

This case distinguished from *Calton* v. *Utah*, 130 U. S. 83.

MOTION to dismiss, affirm or advance. The supposed Federal questions are stated in the opinion.

Mr. C. A. Culberson, Attorney General of the State of Texas, *Mr. Henry M. Furman* and *Mr. Charles H. Armes* for the motion.

Mr. Samuel Field Phillips and *Mr. Frederick D. McKenney* opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Plaintiff in error was indicted by the grand jury of Tarrant County, Texas, for that, in that county, on July 6, A.D. 1889, he " with force and arms, did, unlawfully and with his express malice aforethought, kill and murder one B. C. Evans with a pistol, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State;" and, having been arraigned and pleaded not guilty, was tried, found guilty of murder in the first degree, his pun-

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ishment fixed by the jury at death, and judgment rendered accordingly. Two successive motions for a new trial, setting up twenty-nine alleged grounds therefor, were made, considered and overruled. An appeal was thereupon prosecuted to the Court of Appeals of the State of Texas, and thirty-six errors assigned. The Court of Appeals affirmed the judgment, and application for a rehearing was made, heard and denied. The opinions upon the original and second hearings were delivered by Judge Hurt and are both sent up as parts of the record.

During the trial, in the motions for a new trial, in the assignment of errors in the Court of Appeals, and in the application for a rehearing, no suggestion of a Federal question was made; nor was any right, title, privilege or immunity under the Constitution or any treaty or statute of the United States specially set up or claimed by the plaintiff in error. Notwithstanding, a writ of error from this court was allowed by the Presiding Judge of the Court of Appeals, and the record was filed here January 22, 1891. The case now comes before us on a motion to dismiss or affirm.

Seven errors are assigned. The first, second and third question the validity of the Penal Code of the State of Texas, in the matter of its enactment, and insist that the Federal Constitution was violated by these proceedings taken thereunder. We have already disposed of this objection in *In re Duncan, Petitioner, ante*, 462. The fourth error assails the indictment, and is covered by our decision in *Caldwell* v. *Texas*, 137 U. S. 692. The fifth error relates to the action of the trial court in refusing a continuance, and the sixth to the action of that court in respect to that refusal, upon the motion for a new trial. Under article 560 of the Code of Criminal Procedure of the State of Texas, the application for continuance is addressed to the sound discretion of the trial court, and if it be overruled and the defendant convicted, it is provided "if it appear upon the trial that the evidence of the witness or witnesses, named in the application, was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and

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the cause continued for the term, or postponed to a future day of the same term." Willson's Crim. Tex. Stats. pt. II, p. 154. It was for the Court of Appeals to determine whether the discretionary power of the trial court had been so abused as to amount to error, and whether its reconsideration, upon the motion for a new trial, or the refusal to continue, called for revision. Sections 2169, 2171, 2186, and 2187, pt. II, of Willson's Criminal Texas Statutes, give a large number of cases upon the subject. The matter was for the state courts to decide, and their action presents no Federal question. The Fifth and Sixth Amendments of the Constitution of the United States, referred to by counsel in the assignments of error, are restrictive of the powers of the Federal government and not restraints upon the States, and in the statute and its administration we find no denial of due process of law or of a right secured to plaintiff in error by that instrument. *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, *ante*, 462. The seventh error is to the effect that as the Penal Code of Texas (Art. 607) provided "if the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty," and the Code of Criminal Procedure, (Art. 676,) that "the jury are the exclusive judges of the facts in the cause, but not of the law in any case, they are bound to receive the law from the court and be governed thereby;" and as in this instance, the trial judge read a charge to the jury which did not treat of murder in the second degree, a new law was thereby promulgated and enforced in violation of the Constitution of the United States prohibiting the making or enforcing of any *ex post facto* law, and inhibiting any State from denying the equal protection of the laws; and it is suggested in argument that due process was also denied.

Articles 677, 678, 679, 680, 681, 682, 683 and 684 of the Code of Criminal Procedure (Willson's Cr. Tex. Stats. pt. II, p. 192) provide that the trial judge shall deliver to the jury a written charge setting forth the law applicable to the case distinctly,

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but not expressing any opinion as to the weight of evidence, nor summing up the testimony; and that "this charge shall be given in all cases of felony, whether asked or not;" that it is beyond the province of the judge to discuss the facts or use argument, but it is his duty to state the law of the case plainly; that either party may ask written instructions, which the court shall either give or refuse, with or without modification, but if modified, it shall be done in writing; that the general charge, as well as the instructions given or refused on request, shall be certified by the judge and filed among the papers in the case and constitute part of the record; that the court is not required to charge in actions for misdemeanor, except upon request, and when requested such charges shall be given or refused, with or without modification, as are asked in writing; that no verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties; that when charges are asked, the judge shall read to the jury only such as he gives; that the jury may take with them in their retirement the charges of the court after the same have been filed, but they shall not be permitted to take with them any charge, or portion of a charge, which has been asked and which the court has refused to give.

Article 685 is as follows: "Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall be reversed; *provided*, the error is excepted to at the time of the trial." The charge of the court in this case was given in writing, as required by the statute, and no exception whatever was taken to it, nor any additional instructions asked by the plaintiff in error. In the motion for a new trial and before the Court of Appeals the question was raised that the court should have instructed upon the law of murder in the second degree. By Article 777 of the Code of Criminal Procedure, one of the causes for a new trial in cases of felony is stated thus: "Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights

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of the defendant." Under these articles and similar statutory provisions previously existing, it has been held repeatedly by the Texas courts of last resort that, however immaterial the error may be, if promptly excepted to and presented by a proper bill of exceptions on appeal, the statute is mandatory, and that the conviction must be set aside without inquiry as to the effect of such error upon the jury. But if the error be not excepted to at the proper time, and is first presented in a motion for a new trial, then the rule is that, if under all the circumstances, as exhibited in the record, the error was "calculated to injure the rights of the defendant," the conviction will be set aside, but otherwise it will not be disturbed. *Bishop* v. *State*, 43 Texas, 390; *Johnson* v. *State*, 27 Texas, 758; *Elam* v. *State*, 16 Texas App. 34; *Blocker* v. *State*, 27 Texas App. 16, 43. In the latter case, Judge Willson, in delivering the opinion on the motion for rehearing, said that the decisions were numerous and uniform in Texas "that where there is no evidence from which, by any possible legitimate construction, the jury could conclude that the homicide was murder in the second degree, the court may properly decline to submit to the jury the issue and law of murder in the second degree;" and he cites some sixteen decisions in support of the position.

In the first opinion delivered by the Court of Appeals in the case at bar the court said: "The learned judge submitted the question of self-defence, but did not submit to the jury but one degree of murder, viz., the first. There was no objection to the charge for this omission, nor did counsel request an instruction upon the second degree. We have reversed a great number of judgments, in all manner of felony cases, for this omission, though there was no charge requested, no objection taken, because of the omission to charge the law applicable to the different phases of the case. But, in the absence of requested charges or objection, what is the rule? We are discussing the matter upon the hypothesis that murder of the second degree is presented by some evidence in the record. The rule is stated in *Bishop* v. *The State*, 43 Texas, 390, to be that if the charge is erroneous and is excepted to at the time, the judgment will be reversed; but, though erroneous, if not

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excepted to or proper instructions requested, the judgment for this error may or may not be reversed. If the omission was a material error, calculated to injure the rights of the defendant, though the error is called to the attention of the court first in a motion for new trial, the judgment should be reversed; but in determining whether the error is material and calculated to injure the rights of the accused, we are to look to the whole record bearing upon the subject. What was the nature of the testimony supporting the verdict? Was it cogent and overwhelming? What the character of the testimony presenting the phase or theory of the case omitted to be noticed in the charge and upon which omission error is assigned? Was it at all reasonable? Did it present a theory which a reasonable mind could entertain, or was it supported by such testimony as was remotely calculated to destroy the State's case? When considered in connection with the other testimony in the case, as well as the charge as a whole, was the phase of the case simply an addition to the case as made by the State and consistent therewith, or was it in direct conflict with the State's theory? These are all important matters to be considered in passing upon the materiality of the omission or error so as properly to determine whether the error was calculated to injure the rights of the accused." The evidence considered, the conclusion was reached "that, if a charge had been submitted, permitting the jury to find a less degree, no juror with the least degree of intelligence, unless corrupt, would have entertained for a moment the suggestion of any theory less than murder of the first degree," and that, after a careful examination of the record in the light of the argument and brief for the condemned, and bearing in mind the penalty awarded, the court had failed to find any error requiring a reversal. The discussion was renewed and reënforced in the opinion upon overruling the motion for a rehearing, and additional authorities were cited.

In view of the legitimate purview of the Fourteenth Amendment, as settled by repeated exposition, it is impossible for us to hold that in all this the plaintiff in error was deprived of due process of law or denied the equal protection of the laws, or that his privileges or immunities were abridged.

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In *Calton* v. *Utah*, 130 U. S. 83, we held that where the Code of Utah provided that imprisonment at hard labor in the penitentiary for life might be substituted for the penalty of death when the accused was found guilty of murder in the first degree, if the jury made a recommendation to that effect, the court erred in not calling the attention of the jury to that provision of the statute, since it was not to be presumed that they were aware of their right to make such recommendation; but that was a case which came directly to us from the Supreme Court of the Territory, and the inquiry related to the commission of mere error, and statutory provisions like those of Texas were not under consideration.

A writ of error to review the judgment of the highest tribunal of a State stands on far different ground and cannot be maintained in the absence of a Federal question giving us jurisdiction. The state courts rendered no decision in favor of the validity of a statute of or authority exercised under the State, drawn in question on the ground of repugnancy to the laws of the United States, nor was any title, right, privilege or immunity under such constitution or statute specially set up or claimed in the case. It is not within our province to pass upon any of the questions sought to be presented, as they fall entirely within the scope of the exercise of the powers of the State.

The writ of error is

Dismissed.

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ALLEN *v.* PULLMAN'S PALACE CAR COMPANY.

SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Nos. 1381, 1382. Argued March 16, 1891. — Decided April 13, 1891.

Purely injunction bills cannot be maintained to restrain the collection of taxes upon the sole ground of their unconstitutionality. *Shelton* v. *Platt*, 139 U. S. 591, affirmed and applied.

When in a suit in equity this court finds, on examining the proofs, nothing which makes a proper case for equity, it is its duty to recognize the fact, and give it effect though not raised by the pleadings, nor suggested by counsel.

IN EQUITY. The case is stated in the opinion.

Mr. G. W. Pickle, Attorney General of the State of Tennessee, for appellant.

Mr. Edward S. Isham and *Mr. John S. Runnells* for appellee.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

These were bills filed in the Circuit Court of the United States for the Middle District of Tennessee against the comptroller of that State, for an injunction restraining him from the collection from complainant of certain privilege taxes or license fees for the years 1887, 1888 and 1889, under laws of the State of Tennessee in that behalf, which complainant averred to be in conflict with the Federal and state constitutions, and the taxes accordingly illegal and void.

In No. 1381, the bill alleged that the comptroller was threatening to issue his warrant for the collection of the taxes and to levy it upon complainant's sleeping cars, "and your orator believes and fears that said defendant, unless

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restrained by this honorable court, will proceed to force the collection of said tax so illegally assessed and claimed, by distraining and seizing upon your orator's cars from your orator, and that the proceedings threatened for the collection of said taxes will lead to a multiplicity of suits and will greatly harass your orator. Your orator further shows that all the sleeping and drawing-room cars aforesaid, running in the State of Tennessee, are attached to through express trains on the roads of said railroad companies; that prior to their arrival in Tennessee seats and sleeping berths therein have always been sold by your orator to persons travelling from other States into Tennessee; that your orator has at all times contracts with passengers to give them the accommodations furnished by said cars while travelling upon such railroads; that unless your orator pays the taxes so illegally imposed upon it, your orator believes and fears that said defendant will, unless restrained therefrom by this court, levy upon and seize, in order to force from your orator said illegal taxes, said sleeping and drawing-room cars while the same are in actual use and running attached to said express trains; that thereby the travelling public will be discommoded, the carriage of passengers interstate will be prevented, your orator and said railroad companies may become harassed by many suits for damages by passengers for not furnishing them the accommodations they contracted for, the credit and reputation of your orator for furnishing comfortable accommodations, which credit and reputation are of great value to it and have been established by strict attention to business and at great expense and trouble for many years, will be broken up, and the good will of said business greatly impaired, and thereby your orator will suffer great and irreparable injury."

In No. 1382 complainant averred that the comptroller had issued his warrant to the sheriff of the county of Davidson, Tennessee, and the sheriff by his deputy, one Hobson, "has, by force, and pretending to act under said warrant, seized upon the sleeping car 'Wetumpka,' belonging to your orator, and now holds the same in their possession; that said car is reasonably worth $8000; that said Hobson has advertised

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and threatens to sell said car to satisfy said illegal and pretended tax. That said sleeping car of your orator when seized was being used by your orator in the carrying on of interstate commerce as aforesaid, and was in use as an instrument of interstate commerce and was in Tennessee only by virtue of such use, and was therefore not liable to be taken in satisfaction of said tax, even if it had been a valid tax. That the railroad companies over whose lines of road your orator operates cars are common carriers, and are obliged by law to take upon their trains and carry all who properly present themselves for carriage whether they are travelling between points wholly within Tennessee or not; that such passengers, travelling locally in Tennessee, sometimes apply for sleeping-car accommodations in your orator's cars attached to such train, and, if your orator is obliged to receive them on its cars, then the State of Tennessee by such tax act forces your orator to pay such privilege tax and take out such license or to cease carrying on the interstate commerce in which it is now engaged. That said defendants have demanded said three thousand dollars from your orator, and have declared that they will force your orator to pay the same; that they now threaten to sell said car so seized by them, and your orator believes will do so unless restrained by this honorable court; that said car is very valuable, but will not bring its full value at a forced sale, and your orator fears that it will be sold for a small amount not sufficient to pay said tax, and your orator believes and fears that said defendants, unless restrained by this honorable court, will thereupon proceed to enforce the collection of said tax so illegally claimed, by distraining and seizing upon your orator's other cars, and that the proceedings threatened by defendants for the collection of said taxes will greatly harass your orator. Your orator further shows that all its sleeping cars aforesaid running through the State of Tennessee are attached to through express trains on the roads of the said railroad companies; that prior to their arrival in Tennessee seats and berths have always been sold by your orator to persons travelling from other States into Tennessee; that your orator has at all times contracts with passengers to

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give them the accommodations furnished by said cars while travelling upon said roads; that unless your orator pays the taxes so illegally imposed upon it your orator believes and fears that the said defendants will, unless restrained therefrom by this court, sell said car so already levied on, and, if it does not bring enough to satisfy said tax, will levy upon and seize, in order to force from your orator said illegal tax, its sleeping cars while they are in actual use and running attached to said express trains; that thereby the travelling public will be discommoded, the carriage of passengers interstate will be prevented, your orator and said railroad companies may become harassed by many suits by passengers for damages for not furnishing them the accommodations they contracted for; the credit and reputation of your orator for furnishing comfortable accommodations, which credit and reputation are of great value to it and have been established by strict attention to business and at great expense and trouble for many years, will be broken up, and the good will of said business greatly impaired, and thereby your orator will suffer great and irreparable injury."

The bills prayed for injunction and general relief. Answers and replications were filed and some evidence taken, but nothing appears in the pleadings or proofs bearing upon the question of the standing of complainant in a court of equity, except as indicated by the averments of the bills above quoted. Upon hearing, the relief sought was decreed and the taxes in question perpetually enjoined.

We have already decided in *Shelton* v. *Platt*, *ante*, 591, that purely injunction bills cannot be sustained to restrain the collection of taxes upon the sole ground of their unconstitutionality. The jurisdictional averments are more comprehensive in these causes than in that, but we are of opinion that they did not make out a case for equity interposition, for the reasons there given, and in view of the act of Tennessee of 1873, entitled "An act to facilitate the collection of revenues," approved March 21, 1873. Laws Tenn. 1873, c. 44, p. 71.

So far as appeared, complainant could avert all the consequences which it deprecated as likely to ensue if the state

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officials were not restrained, by complying with the terms of that statute and availing itself of the remedy thereby afforded. *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34.

There is, however, this marked distinction between *Shelton* v. *Platt* and these cases. In *Shelton* v. *Platt* the objection to the jurisdiction was asserted by motion, by plea and by the answer. Here that objection is urged apparently for the first time in this court, but inasmuch as the entire record fails to show complainant entitled to an injunction within the rule announced, the decrees must nevertheless be reversed. It is true that there was a prayer for general relief, but relief given under the general prayer must be agreeable to the case made by the bill, and in this instance the complainant sought a preventive remedy only.

Ordinarily, where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject matter, the objection of the adequacy of the remedy at law should be taken at the earliest opportunity and before the defendant enters upon a full defence. *Reynes* v. *Dumont*, 130 U. S. 354; *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530. But in *Lewis* v. *Cocks*, 23 Wall. 466, it was held that if the court, in looking at the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. *Parker* v. *Winnipiseogee Woollen Co.*, 2 Black, 545; *Oelrichs* v. *Spain*, 15 Wall. 211; *N. Y. Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205.

The decrees are reversed, and the causes remanded for further proceedings in conformity with this opinion.

MR. JUSTICE HARLAN and MR. JUSTICE BROWN dissented.

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BYBEE v. OREGON AND CALIFORNIA RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 276. Argued March 31, 1891. — Decided April 20, 1891.

The grant of "lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland in Oregon," made by the act of July 25, 1866, 14 Stat. 239, c. 242, was a grant *in præsenti;* and the provision in section 8 of that act that in case the companies should fail to complete the road on or before July 1, 1875, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States, is a condition subsequent, of which only the United States can take advantage.

Under the act of July 26, 1866, 14 Stat. 251, c. 262, "granting the right of way to ditch and canal owners over the public lands," no right could be acquired to any portion of the public lands until the actual taking possession of the same for the purpose of constructing a ditch.

A conveyance by deed of a perpetual right in land, for a solid consideration therein expressed, without any covenant for the payment of rent or the redelivery of possession, creates the relation of grantor and grantee between the parties.

The grantee in a deed of conveyance is not estopped to deny the title of his grantor.

The plaintiff in error, under the act of July 26, 1866, 14 Stat. 251, c. 262, constructed a ditch over lands granted to the defendant in error for a railroad under the act of July 25, 1866, 14 Stat. 239, c. 242. The defendant in error, under a misapprehension of its legal rights, received a deed from the plaintiff in error, conveying a license to enter upon said ditch and construct its road over the same, for the consideration of $250 paid by defendant in error to plaintiff in error, and upon condition against impairing or destroying said ditch. The plaintiff in error sued the defendant in error for so constructing its road as to permanently obstruct and destroy his ditch. *Held*, that the defendant in error by accepting the deed, was not estopped from denying the title of the plaintiff in error, or from asserting the invalidity of the covenant into which it had inadvertently entered.

THIS was an action originally begun in the state court for Jackson County, Oregon, and removed to the Circuit Court of the United States upon the petition of the defendant, upon the

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ground that the case involved the validity of conflicting grants of land from the United States. The plaintiff sued to recover for damages to a water ditch and water right, occasioned by the construction of the defendant's road. His complaint alleged, in substance, that on the third of September, 1883, he was the owner of an undivided half of a certain water ditch and water right on the south side of Rogue River, in Jackson County, and in lawful possession of the same, as tenant in common with one Daniel Fisher; that upon this day the plaintiff and Fisher, for the consideration of $250 paid to them, executed a deed to defendant of a right to construct and operate its railroad and telegraph line across the said water ditch, but upon condition that it should not in any way destroy or injure the same, or obstruct their use and enjoyment of it as a means of conveying water through the same; and that the defendant accepted the deed, received possession of the water ditch and constructed its railroad and telegraph line across the same, but in such a manner as to permanently obstruct and destroy it, and render it impossible to use it for the conveyance of water, and refused to make any compensation to the plaintiff for his interest therein.

The answer of the defendant, in substance, denied the ownership of plaintiff and Fisher in any portion of the water ditch or water right alleged to have been destroyed by the defendant, and denied their lawful possession thereof. It further denied that the deed set forth in the complaint contained any condition whatever, or that defendant ever assented to any condition connected with such deed, or received possession of the ditch under this deed; and alleged as a separate defence to the complaint that it was incorporated to construct and operate a railroad and telegraph line from Portland, in Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River valleys to the California line on the southern boundary of Oregon. That by section three of an act of Congress, approved July 25, 1866, 14 Stat. 239, c. 242, there was granted to it a right of way through the public lands of the United States, to the extent of one hundred feet in width on each side of the said railroad where it might pass

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through such lands. That the lands through and over which the portion of the said water ditch, alleged to have been injured by defendant, was constructed and is situated, were at the date of said act public lands of the United States, over and upon which the defendant had the right, by virtue of the grant made in that act, to locate its right of way and construct its railroad and telegraph line. That in locating said right of way and constructing said road it became necessary for the defendant to appropriate to its use one hundred feet in width on each side of its road, through and over which said lands a portion of said water ditch alleged to have been injured by defendant was located and constructed, and that the defendant did accordingly locate its right of way over the ground through which the water ditch was dug, and constructed its road over such right of way, and that any injury which may have been done to said ditch was done in the course of such construction.

The answer further alleged that on May 17, 1879, the said Daniel Fisher attempted to appropriate to his own use, under the mining laws of the United States, a portion of said right of way, and constructed thereon the said ditch; that the only claim of right ever made by Fisher to locate and dig that portion of such ditch was obtained by virtue of his pretended compliance with certain provisions of the mining laws; that he had no other interest or ownership in such land than the right so acquired, and plaintiff's only interest therein was acquired under and through said Fisher; and that defendant took nothing by the deed mentioned in the complaint, as it then owned, by virtue of the said grant of the United States, all the rights and property pretended to be conveyed by said deed, and never received any consideration whatever for the sum alleged to have been paid by it for such pretended conveyance.

To this separate defence in the answer the plaintiff demurred, upon the ground (1) that it did not state facts sufficient to constitute a defence. (2) That the facts stated in the complaint estopped the defendant from setting up the right of way mentioned in such defence, or any benefit under the Congressional

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grant of the right of way of July 25, 1866, set forth in such defence. (3) That defendant had forfeited and lost all its right under such grant over the land where the ditch was situated, by its failure to complete its railroad on or before the first day of July, 1875, and had at no time since owned any right or interest in such land or right of way over the same.

The court below overruled the demurrer in an opinion reported in 11 Sawyer, 479, and 26 Fed. Rep. 586, and the plaintiff not desiring to plead further, entered a final judgment in favor of the defendant, to reverse which the plaintiff sued out this writ of error.

Mr. John H. Mitchell for plaintiff in error.

It is conceded that but for the qualifying provisions of section 8 in the act of July 25, 1866, this grant must be held to be a grant *in præsenti*, under and by virtue of which the lands granted passed directly as of the date of the grant to the company; and that the conditions of the grant in such event are conditions *subsequent*, and in such case the grant can only be defeated by a failure to comply with the conditions subsequent, and in which case there must be a reëntry upon the part of the government. But it is respectfully insisted that the words of *present grant* in the second section of the act are so qualified by the provisions of section 8, that upon a proper and fair construction of the act *as a whole*, the conditions, and all the conditions, so far as they relate to the right of way and the completion of the road within a certain time, must be held to be conditions *precedent*, and not conditions *subsequent*. And not only so, but being conditions *precedent*, such failure to comply with them within the time required by the act, especially in view of the provision that in such event the act should be *null and void*, operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented.

It will be observed by the court that the provisions of this act as to the effect of a failure to comply with the conditions, whether they be regarded as conditions subsequent or condi-

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tions precedent, are essentially different in phraseology and in legal effect from the great body of Congressional grants to railroad companies.

A striking similarity, however, will be found between the act under consideration in this respect and the act granting lands to aid in the construction of railroads in the Territory of Minnesota, and which came under consideration in this court in the case of *Rice* v. *Railroad Co.*, 1 Black, 358, and in which case this court held that although words of present grant were used in the granting section which, had they stood alone, would have passed the title as of the date of the grant, they were so qualified by subsequent provisions of the act as to prevent the same from being a present grant. This case was approved in *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, *ante*, 1.

The granting words in the Minnesota act and those in the grant under consideration are exactly alike, but as in that case the court found in the subsequent language an intent on the part of Congress to limit and modify the meaning of the words "that there shall be and is hereby granted," so in this case we have the same intent expressed in somewhat similar but much more emphatic language, which makes the conclusion irresistible that no *present estate* was granted or intended to be granted by Congress to these railroad companies.

In presenting this case counsel are not unmindful of the rulings of this court — notably in the case of *Railroad Co.* v. *Baldwin*, 103 U. S. 426 — giving construction to an act of Congress, then under review, granting right of way to a railroad company somewhat similar to the act making grant to the defendant in so far as it relates to the nature and effect of the grant of right of way over the public domain; and in discussing this case there is no disposition to contest the correctness of the rule laid down in the case referred to, and perhaps in some other cases since that time, as applicable to the particular grants referred to, and as applicable to the facts presented in connection therewith, as to progress made by the companies respectively under those grants where rights of settlers were supposed to have attached.

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Our contention is that the act of July 25, 1866, under which the defendant claims, is radically different from the act discussed in 103 U. S. *supra*, and also that the route or line of road under the former had not, as in the adjudicated cases, been established. The act is different in this, as we have seen, that it provides *in terms*, not merely that on a failure to build the whole of the road by July 1, 1880, all lands not conveyed by patent to said company at the date of any such failure shall revert to the United States, but *also* that the *act* itself shall be "*null and void.*" No such clause as this appears, so far as I have been able to examine, in any of the other acts of Congress making grants of public lands or right of way over the public lands to any railroad company save in the one amendment, *supra.* It was clearly the opinion of Congress, it would seem, that in the event of a failure upon the part of the company to build the whole road within the time specified, viz., July 1, 1880, to take it out of the power of the company to do a further solitary act under or in pursuance of the act of Congress. It was clearly the intention of Congress that the company in such a case should be entitled to the lands patented to it, but in so far as any right upon the part of the company was concerned to enter upon the public domain, or any part of it, for the purpose of locating or constructing its road *after* such failure to complete the road within the time specified, it was the intention of Congress to destroy it by declaring, as it did, that the *act itself* should be *null and void.* In other words, the act, taken as a whole, simply conferred a *power* upon the company, to be exercised within a certain time and upon certain conditions. A failure to exercise the power within the time was an end of the whole business, and then the act itself under which the company could act ceased to exist, because the power that created it declared that it should then be *dead* — null and void.

This is not the case, therefore, it is respectfully insisted, of an *estate vested* under a *present grant*, and subject to forfeiture for breach of a condition subsequent, but requiring further proceedings to enforce the penalty.

But it is the case of a legislative power not attempted to be

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exercised until, by the very terms of the instrument creating it, the time within which it could be exercised had expired.

If this power to "lay out, locate and construct" had been exercised during the prescribed term of its existence, it would have given effect to the granting words in the original act and vested the legal title to the two-hundred-feet right-of-way strip in the defendant.

But as none of these steps were taken during the continuance of the power, no estate ever vested in defendant, and there is no ground for the application of this doctrine.

That the authority to act terminated with the expiration of the time fixed by the amendment of June 25, 1868, is clear from the language used, and well settled by judicial decisions. *In the matter of the Brooklyn, Winfield &c. Railway Co.*, 72 N. Y. 245; *Brooklyn Steam Transit Co.* v. *Brooklyn*, 78 N. Y. 524; *Union Hotel Company* v. *Hersee*, 79 N. Y. 454; *Farnham* v. *Benedict*, 107 N. Y. 159.

It is conceded in the pleadings, and also by the court below in the opinion, that the Oregon and California Railroad Company, defendant, had not completed its road, even so far as the location of the premises in question, within the time prescribed by Congress for its completion; nor was it completed to that point, as clearly appears, on September 3, 1883, as it was on that date the defendant purchased from plaintiff and his tenant in common the right to construct and operate its road at a point between the termini thereof across the ditch of the plaintiff.

The same rule was recognized as correct with reference to the provision in a special act, "the franchises thereby granted shall be *null and void*, unless the corporation shall commence the work of constructing the hotel within two years from the passage of this act, and complete the same within four years from the time of commencing the construction thereof;" but held inapplicable in view of an amendment extending time for the performance of these acts. *Union Hotel Company* v. *Hersee*, 79 N. Y. 454, 457, 459. See also *Brooklyn, Winfield & Newtown Railway*, 81 N. Y. 69; *Farnham* v. *Benedict*, 13 N. E. Rep. 784; *Railroad Co.* v. *Alling*, 99 U. S. 463.

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The decision in *Railroad Co.* v. *Baldwin*, 103 U. S. 426, cited and relied upon below, involves no such issue. There the railroad company had located its right of way within the time prescribed, and while it still had the power to do so, and the court held that such location related back to the date of the act making the grant, and cut out intervening claims.

But the effect of such authorized location was to vest an estate in the lands covered by the right of way in the railroad company and bring the case within the rule as to forfeiting vested interests for breach of subsequent conditions. That a valid location pursuant to the authority conferred by the act making such a grant is necessary to vest an interest in the particular tracts of land is undeniable. This proposition is conceded everywhere. *Van Wyck* v. *Knevals*, 106 U. S. 360.

An expression in the opinion of this court in *Schulenberg* v. *Harriman*, 21 Wall. 44, is cited in the opinion of the court below in the present case as favoring the conclusion there announced. But there was no issue in that case involving the point, and what is said there as to the continuance of a power to sell in the face of an explicit prohibition in the act creating the power is simply *obiter*.

The second ground relied on by plaintiff to avoid the defence interposed is that of estoppel.

The complaint alleges, and the separate defence in the answer demurred to admits, in effect, that defendant went into possession of the portion of plaintiff's ditch crossed by its railroad track under a deed from plaintiff and his tenant in common for the consideration of $250 paid, and assenting to the condition therein against impairing or destroying said ditch, the only right conveyed being a license "to enter on said ditch and construct and operate its railway over the same" upon said condition. The complaint further alleges that defendant utterly destroyed the ditch in violation of this condition. And this, too, the defence admits.

The acceptance of possession under this deed, it is submitted, created the relation of landlord and tenant between them, and not that of vendor and vendee, so far as the doctrine of estoppel is concerned. The plaintiff still retained his interest in the

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premises, and the defendant assumed the obligation of preserving his ditch and doing nothing to injure it or obstruct the flow of water through the part thus delivered into its possession. In these stipulations and conditions there was an agreement, in *legal effect*, that the violation of these essential conditions by the defendant was an event upon the occurrence of which there was to be a surrender of that possession. *Osterhout* v. *Shoemaker*, 3 Hill, 513. See also *Blight's Lessee* v. *Rochester*, 7 Wheat. 535; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Jackson* v. *Ayers*, 14 Johns. 224; *Jackson* v. *Walker*, 7 Cowen, 636; *Phelan* v. *Kelly*, 25 Wendell, 388; *Morrison* v. *Bassett*, 26 Minnesota, 235.

But, conceding for the argument that the relation of landlord and tenant did not exist, but rather that of vendor and vendee, we still insist the defendant is, under the exceptional circumstances of this case, estopped from controverting plaintiff's title, under which it took possession of plaintiff's ditch and destroyed it, contrary to its agreement.

The defendant having accepted the deed, is bound by the terms of the deed as effectually as though it had been sealed and executed by him.

A deed executed by one party only, but containing a covenant on the part of the other to perform certain acts, binds the latter, if he accepts the deed and takes possession under it, as effectually as if he had signed it. *Spalding* v. *Hallenbeck*, 35 N. Y. 204.

The old common law rule that the estoppel cannot be broader than the deed, and that in unilateral instruments to which one party only sets his seal the grantor only is estopped, while the grantee is not, is not applicable in our system of jurisprudence, and all the authorities are to the contrary. *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; Bigelow on Estoppel, 356, and authorities there cited; Coke Litt. 47.

It will be perceived that in this case every reason upon which the right of a vendee to deny his vendor's title is based is lacking. It cannot be said in this case that the vendee owes no faith or allegiance to the vendor; neither can it be said that the title of the vendor is extinguished; nor can

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it with truth be said, as in an ordinary case of vendor and vendee, that the vendee, the defendant, does no wrong by treating plaintiff as a stranger to the title by controverting that title.

The attempt in this case upon the part of the defendant to deny plaintiff's title by setting up another in itself is similar to the case of a grantee of lands, while holding possession under his grantor, attempting to dispute his grantor's title for the purpose of escaping the payment of the purchase price of the same; and this the courts have universally held will not be permitted. *Peters* v. *Bowman*, 98 U. S. 56; *Robertson* v. *Pickerell*, 109 U. S. 608–615; *McCanihe* v. *Fales*, 107 N. Y. 404; *York* v. *Allen*, 30 N. Y. 104; *Crum* v. *Wright*, 97 Missouri, 13; *Munford* v. *Pearce*, 70 Alabama, 452; *Marsh* v. *Thompson*, 102 Indiana, 272.

While the general rule is well established that the grantee ordinarily is not estopped to deny the grantor's title, this rule is not applicable to a case in which the only title asserted by the grantee is the precise title he has acquired from the grantor, nor to a case where both parties claim from a common source, and the title is identical in that source. Herman on Estoppel, vol. 2, § 603, p. 738; *Wilcoxon* v. *Osborn*, 77 Missouri, 621.

The defendant is not only the tenant of plaintiff in respect of the estate conveyed to it, but is tenant in common with plaintiff as to the ditch property and water rights in which each held a separate estate, but joint possession.

By acceptance of the deed by defendant from plaintiff and its entering into joint occupancy with the plaintiff of the ditch and the water rights covered by the deed and in pursuance of it, the defendant became not only the tenant of the plaintiff as to the estate or interest purchased, but it and plaintiff became tenants in common, each having a right to the use in different forms of the same identical piece of property. This relation having been established, it is not within the power of the defendant, while still continuing in such possession and use, to contest the title of the plaintiff by which he was admitted to it, or set up an outstanding title as against his tenant in common, who is *also* his landlord in respect of the

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estate transferred by the deed to defendant. *Phelan and Wife* v. *Kelly*, 25 Wend. 389; *Jackson* v. *Hinman*, 10 Johns. 292; *The Proprietors of Braintree* v. *Battles*, 6 Verm. R. 395.

Mr. J. Hubley Ashton (with whom was *Mr. Charles H. Tweed* on the brief) for defendant in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Two questions are presented by the record in this case. First, whether the defendant lost the power to take possession of its right of way by its failure to construct its road within the time limited by the acts of Congress. And second, whether it is estopped to claim that it took nothing under its deed from the plaintiff, and may set up a separate and independent title in itself.

1. By section 2 of an act of Congress approved July 25, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," 14 Stat. 239, there was granted to such company organized under the laws of Oregon, as the legislature of said State should thereafter designate, to aid in the construction of its road, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile," not otherwise disposed of by the United States, with the right to select from the odd sections, within ten miles beyond the limits of the granted lands, other lands in lieu of any which might have been so disposed of prior to the location of the line; and by section 3 there was granted to it the right of way through the public lands, to the extent of 100 feet in width on each side of said railroad, where it might pass over the public lands, including all necessary grounds for stations, etc.

By section 6 the companies were required to file their assent to the act within one year; to complete the first twenty miles within two years, and at least twenty miles in each year thereafter, and the whole on or before the 1st of July, 1875.

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Section 8 provided that in case the company should not complete the same as provided in section 6, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States;" but by a subsequent act of June 25, 1868, 15 Stat. 80, the time for completing the road was extended to July 1, 1880.

That the company did not complete its road by the time limited by the act of 1868, namely, July 1, 1880, is conceded by both parties, and is evident from the fact that the defendant took this deed from the plaintiff on December 3, 1883, wherein, for the consideration of $250, it was agreed that the defendant might enter upon plaintiff's water ditch, and construct and operate its railroad and telegraph line over the same. Indeed, it appears to have been a matter of such common knowledge in the State of Oregon that the road was not constructed until after 1880, that the court below was inclined to take judicial notice of the fact.

The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered by this court as taking effect *in præsenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located, and the map is filed with the Secretary of the Interior. The act then operates as a grant of all odd-numbered sections within the limits, except so far as they may have been in the meantime "granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of." And in all the cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the lands. Thus in *Schulenberg* v. *Harriman*, 21 Wall. 44, the act of Congress granting the lands provided in what manner the sales should

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be made, and enacted that if the road were not completed within ten years no further sales should be made, and the lands should revert to the United States. That was decided to be no more than a provision that the grant should be void, if the condition subsequent were not performed. Said Mr. Justice Field, in that case: "It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. . . . And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed." p. 63. The doctrine of this case was approved and reapplied to a similar grant to the St. Joseph and Denver City Railroad, in *Van Wyck* v. *Knevals*, 106 U. S. 360. In *St. Louis &c. Railway Co.* v. *McGee*, 115 U. S. 469, 473, it was said by Chief Justice Waite to have been often decided "that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law." "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity." The manner in which this forfeiture shall be declared is also stated in *United States* v. *Repentigny*, 5 Wall. 211, 267; *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, 92 U. S. 49, 66; *McMicken* v. *United States*, 97 U. S. 204, 217.

An effort is made to distinguish this case from *Schulenberg* v. *Harriman*, in the fact that the act not only declares that the lands "shall revert to the United States," but that the act

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itself "shall be null and void," from which it is argued that it was the intention of Congress that the failure to complete the road should operate *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. It is true that the language of this statute differs somewhat from that ordinarily employed by Congress in connection with similar grants; but the declaration that the lands "shall revert to the United States" is practically equivalent to a declaration that the act granting such lands shall cease to be operative if the company fail to complete its road within a specified time, or as Mr. Justice Field puts it in *Schulenberg* v. *Harriman:* "The provision in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed." The title to the land having vested in the company by virtue of the grant, the provision that it shall complete the road within a certain number of years does not cease to be a condition subsequent by declaring that the act shall be null and void, if the condition be not complied with.

And the law is well settled that it is only the grantor, or those in privity with him, who can take advantage of the forfeiture. Indeed, the provision that "this act shall be null and void" is immediately followed by words indicating that it is only to a limited extent, that is, so far only as lands not already patented are concerned, that the nullity of the act extends, the language being: "This act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States." As to lands theretofore patented the act continued in full force and effect. As remarked by the learned judge of the court below: "It is to become 'null' only so far as to allow the grantor to resume the grant on a failure to comply with the condition, and then only as to the lands remaining unpatented or unearned; and, but for this qualification the grant might have been wholly resumed or forfeited for any failure to comply with the condi-

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tion, even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of Congress in making the grant." A condition that would put it beyond the power of the company to build the last mile of its road by the aid of the granted lands is manifestly so harsh and unjust, that the breach of such condition ought not to be treated as a forfeiture, unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction.

Counsel for plaintiff has called our attention to several cases decided by the Court of Appeals of New York which doubtless have a bearing upon this question, but which, when carefully examined, are readily distinguishable. *Matter of Brooklyn &c. Ry. Co.*, 72 N. Y. 245; *Brooklyn Steam Transit Co.* v. *City of Brooklyn*, 78 N. Y. 524; *Union Hotel Company* v. *Hersee*, 79 N. Y. 454; *Farnham* v. *Benedict*, 107 N. Y. 159. In these cases the legislative act did not avoid the grant upon the non-performance of the condition subsequent, but declared that the corporate existence and powers of the company to act were at an end. In other words, it fixed a time for the expiration of the charter, and, when that time arrived, the corporation lost its power to act or to do any business beyond such as was necessary in the process of winding up. It was not so much a case of forfeiture as of loss of legal entity, or, as expressed in the language of the Court of Appeals in the case in 78 N. Y., "In case of non-compliance, the act itself ceases to have any operation, and all the powers, rights and franchises thereby granted were deemed forfeited and terminated. There was to be not merely a case of forfeiture, which could be enforced by an action instituted by the Attorney General, but the powers, rights and franchises were to be taken and treated as forfeited and terminated. At the end of the time limited the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence."

More directly in point is the case of *Oakland Railroad Co.* v. *Oakland, Brooklyn &c. Railroad Co.*, 45 California, 365. In this case an act of the legislature granting a corporation the right of way to lay a street railroad track provided "that,

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if the provisions of this act are not complied with, then the franchise and privileges herein granted shall utterly cease and be forfeited." A breach of this condition was held *ipso facto* to forfeit the franchises of the corporation. A distinction was drawn in this case between forfeitures at common law, which did not operate to divest the title of the owner until, by proper judgment in a suit instituted for that purpose, the rights of the State had been established, and a forfeiture declared by statute, in which case the title to the thing forfeited vests immediately in the State, upon the happening of the event for which the forfeiture is declared.

The doctrine of these cases has not been universally accepted, however, and in several States, notably in Massachusetts, it has been distinctly repudiated. Thus, in *Briggs* v. *Cape Cod Ship Canal Company*, 137 Mass. 71, the act of incorporation of a canal company provided that, if a certain amount were not expended in the actual construction of the canal within four months from the passage of the act, the "corporation shall thereupon cease to exist;" and, further, that, if a certain other amount were not deposited by the company with the treasurer of the Commonwealth within the same time, the corporation should thereupon cease to exist. It was declared in the opinion of the court to be "too well settled to admit of discussion, that a corporation can be judicially determined to have ceased to exist only in a suit to which the Commonwealth is a party. The act of incorporation is a contract between the Commonwealth and the corporation: Whether the corporation has complied with the conditions is a question of fact to be judicially determined. The Commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition;" citing a number of prior cases in the same State.

In *Atchafalaya Bank* v. *Dawson*, 13 La. 497, an act for the incorporation of a bank provided that upon the suspension or refusal of payment in specie for more than ninety days, "the charter shall be *ipso facto* forfeited and void." But it was held that until the forfeiture was judicially decreed, neither the

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forfeiture nor the cause could be inquired into in another suit, nor could the existence of the corporation be questioned incidentally or collaterally. To the same effect is the case of *Lagrange & Memphis Railroad Company* v. *Rainey*, 7 Coldwell, 420. In this case it was held that if an act of incorporation fixes a definite time in which the charter shall expire, when the time for this expiration arrives the corporation is dissolved. But if its continuance beyond a fixed time is made to depend upon the performance of a given condition, the nonperformance of the condition is a mere ground of forfeiture. "This, however, can only be taken advantage of by the State in a proceeding in the nature of a *quo warranto*, and the existence of the corporation can never be collaterally called in question." It is not, indeed, always easy to determine whether a condition be precedent or subsequent; it must depend wholly upon the intention of the parties as expressed in the instrument, and the facts surrounding its execution. If the condition does not necessarily precede the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evident that the intention of the parties is that the estate shall vest, and the grantee shall perform the act after taking possession, then the condition is treated as subsequent, and there is no forfeiture without a reëntry by the grantor, or, in the case of the State, without some action on its part manifesting an intention to resume its title. In the case under consideration, the act, as already stated, takes effect as a present grant and the provision for a forfeiture in case the company fails to complete its road is clearly a condition subsequent.

Upon the whole we think there is nothing to distinguish this case from *Schulenberg* v. *Harriman*, and that the learned judge of the court below was correct in holding that the railroad company had not forfeited its right to construct its road by failure to complete the same within the time limited.

The distinction between a right of way over the public lands, and lands granted in aid of the construction of the road, is important in this connection. As to the latter, the rights of settlers or others who acquire the lands by purchase or

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occupation between the passage of the act and the actual location and identification of the lands, are preserved unimpaired, while the grant of the right of way is subject to no such condition; and in the construction given by this court to a similar grant in *Railroad Company* v. *Baldwin*, 103 U. S. 426, a person subsequently acquiring any part of such right of way takes it subject to the prior right of the railroad company. As remarked by the court in that case, p. 430, "If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route."

The only title which the plaintiff seems to have had to the land in question was by virtue of an appropriation or occupation of the same under the act of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes." 14 Stat. 251. But as his occupation dates only from May, 1879, long after the defendant company had become entitled to its right of way over these lands by virtue of the act of July 25, 1866, his claim was clearly subordinate to that of the railroad company. Under this act the plaintiff acquired no right to any portion of the public lands until his actual taking possession of the same for the purpose of constructing a ditch, and in so doing he took the risk of encroaching upon the right of way which the railroad company might thereafter select for the purposes of their road. This very question arose in the Supreme Court of California, in the case of *Doran* v. *Central Pacific Railroad Company*, 24 California, 245, in which the court observed, p. 259, that "the grant by Congress of the right of way over any portion of the public land, to which the United States have title, and to which private rights have not been attached under the laws of Congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can

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prevent the grantee from entering, in pursuance of his grant, or can recover damages that may necessarily be occasioned by such entry." We regard this exposition of the law as sound, and the case as exactly in point in this connection.

2. With regard to the question of estoppel, the complaint alleges that the defendant went into possession of that portion of the plaintiff's ditch across which its road was constructed, under a deed from plaintiff and his tenant in common, for a consideration of $250 paid, and assented to the condition therein contained against impairing or destroying said ditch, the only right conveyed being a license "to enter on said ditch and construct and operate its road over the same," upon such condition. The contention of the plaintiff is that in receiving this deed and entering into possession the relation of landlord and tenant was created between them, and not that of vendor and vendee, so far as the doctrine of estoppel is concerned. But as the deed was the conveyance of a perpetual right for a solid consideration therein expressed, and there was no covenant for the payment of any rent, nor for the redelivery of possession, we think it should be regarded as creating the relation of grantor and grantee between the parties thereto. We have already found that the title of the company to its right of way upon the location of its route related back to the date of the act, and hence that when it took possession of the land in question plaintiff had no title thereto which he could set up against the company. Had the defendant not accepted the deed from the plaintiff, it might, under our ruling upon the first point, have treated him as a trespasser. The real question then is, whether the defendant is placed in a worse position by having accepted the deed from a party who had no title to the premises he assumed to convey — the defendant having taken the conveyance under a mistaken view of the law applicable to the case.

It is conceded that, as a general principle, the grantee in a deed of conveyance is not estopped to deny the title of his grantor, and unless this case be an exception to this rule, it will necessitate an affirmance of this judgment. The rule was first applied by this court in the case of *Blight's Lessee* v.

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Rochester, 7 Wheat. 535, in favor of the grantee, who was permitted to show that the person from whom he derived title was an alien, and, under the laws then existing, incapable of transmitting by inheritance the title to lands in this country. In *Merryman* v. *Bourne*, 9 Wall. 592, it was stated that the vendee "holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party;" and in *Robertson* v. *Pickrell*, 109 U. S. 608, it was held, in an elaborate opinion by Mr. Justice Field, that defendants, who held under a deed of a life estate, were not estopped from setting up a superior title. Cases in the state courts to the same effect are *Comstock* v. *Smith*, 13 Pick. 116; *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Clee* v. *Seaman*, 21 Michigan, 287; and *Sparrow* v. *Kingman*, 1 N. Y. 242.

Upon the other hand, there are doubtless some exceptions to the rule arising out of circumstances which would render the repudiation of the grantor's title "a breach of good faith and common honesty" on the part of the grantee. Thus he cannot refuse to pay the consideration named in his deed, nor probably to perform any other strictly personal covenant, nor, as remarked by the court in *Robertson* v. *Pickrell*, can the grantee, in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title obtained from his grantor, or through him, is sufficient for his protection, and not available to his contestant. Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance. Thus in *Wilcoxon* v. *Osborn*, 77 Missouri, 621, it was stated that the rule was not applicable to a case where the only title asserted by the grantee was the precise title he had acquired from the grantor, nor to a case where both parties claimed from a common source, and the title was identical in that source. In that case, a county having received the purchase money for a tract of swamp land, caused a deed to be made to the purchaser by the county commissioner. On the same day the county made a loan of school funds, taking as security a mort-

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gage on the land. Subsequently the county caused the mortgage to be foreclosed. The defendant derived title through this foreclosure. It was held, as against the heirs of the original purchaser, that the defendant was estopped to deny the validity of the commissioner's deed. So, in *Phelan* v. *Kelley*, 25 Wend. 389, it was held that where a person, having a possessory title to lands, dies in possession, leaving several children, his heirs-at-law, who succeed to such possession, it was not competent for one of such heirs, who had obtained the exclusive possession of the whole of the premises, to defeat a recovery, by his co-heirs, of their proportional parts or shares, by setting up a title acquired from the owners of the land; that, to avail themselves of such title, they must first surrender possession to their co-heirs, and then bring ejectment. And in a number of cases it has been held that where one takes by descent as a co-heir or tenant in common, he cannot show, in an action of ejectment by his co-heir, that his ancestor had no title. *Jackson* v. *Streeter*, 5 Cowen, 529; *Proprietors of Braintree* v. *Battles*, 6 Vermont, 395.

But the consequences of treating this case as an exception to the general rule are somewhat serious. If, as we hold, the defendant had the prior right to this land, it was under no obligation to treat with the plaintiff or pay him for the disturbance of his possession, which was unlawful as against the company. Has it by this deed disqualified itself forever from asserting the right that it would have possessed had it not done this? We think not. Assuming, as some of the cases indicate, that before disputing the title of his grantor the grantee is bound to surrender his possession taken under the deed, such requirement is obviously inapplicable to a case like this, where the only possession consists in the disturbance of a water right or ditch claimed by the plaintiff, by the construction of the road across such ditch. It could only be restored by the destruction of the road and the rebuilding of the ditch; in other words, by the surrender of possession under the deed, and a repudiation of the entire transaction, when it is admitted that the defendant could set up its prior title and proceed against the plaintiff as a trespasser. But

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this would be a useless and expensive formality; and we think the rule that forbids a tenant from disputing his landlord's title without first surrendering his possession has no application to a case like this. It may be said in general that the doctrine of estoppel exists only where there is an obligation to restore the possession of the land, upon certain contingencies, such, for instance, as exist between landlord and tenant, or mortgagor and mortgagee. In such cases the occupant is considered to have pledged his faith to return the possession of the land which he occupies, and will not be permitted to do anything to impair the title of him from whom he has received it. 3 Wash. Real Property, 98; *Gardner* v. *Greene*, 5 R. I. 104; *Osterhout* v. *Shoemaker*, 3 Hill, 513.

In this case the defendant not only did not agree to resurrender possession to the plaintiff, but it accepted the deed with this covenant or condition, for which it received no consideration, and we do not consider it a breach of good faith upon the part of the defendant to set up this fact, nor ought it to be put in a worse position by having accepted this deed and paid $250 therefor, than it would have occupied had it refused altogether to treat with the plaintiff. The deed was evidently delivered and received by these parties under a misapprehension of their legal rights, and it would be manifestly unjust to hold the defendant forever estopped from asserting the invalidity of the covenant into which it had inadvertently entered.

The judgment of the court below must be

Affirmed.

BOONE COUNTY *v.* BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 297. Argued April 9, 1891. — Decided April 20, 1891.

The statute of limitations of Nebraska, of four years, as to an action for relief on the ground of fraud, and the doctrine of laches, apply to a suit by a county in Nebraska, brought in the Circuit Court of the United

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States for the District of Nebraska, to set aside a decree of the same court for fraud.

Facts stated which supported the defences of the statute of limitations and of laches.

THE case is stated in the opinion.

Mr. J. C. Cowin for appellant.

Mr. T. M. Marquett for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a bill in equity, filed on the 9th of June, 1883, in the Circuit Court of the United States for the District of Nebraska, by the county of Boone, a municipal corporation of the State of Nebraska, against the Burlington and Missouri River Railroad Company in Nebraska, a Nebraska corporation, and Horatio H. Hunnewell, a citizen of Massachusetts.

The bill avers that during the years from 1873 to 1877, both inclusive, the railroad company owned certain lands, of which a schedule is annexed to the bill; that for those years taxes were assessed upon those lands, by the proper authorities of Boone County, amounting in all to $68,666, which, with legal interest, costs and penalties, amount now to more than $90,000; that on the 4th of March, 1878, said Hunnewell filed a bill in the Circuit Court of the United States for the District of Nebraska, against the railroad company, and the board of county commissioners of Boone County, and one Pullman, treasurer of the county, to compel the cancellation of said taxes and procure a decree declaring them to be illegal and void; that on the same day, without the issue of process, the then board of county commissioners of Boone County, by M. H. Sessions, a solicitor of the court, pretended to appear and file a stipulation consenting to the taking of the bill *pro confesso*, and to the entry of a decree in favor of Hunnewell for the relief prayed, granting a perpetual injunction against the collection of any of the taxes, declaring the same to be illegal and void, and relieving the lands from the lien thereof, which decree was entered on the 8th of March, 1878. A copy of the bill filed by Hunnewell is annexed. It set forth that the

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plaintiff and all the stockholders of the company, who numbered over one thousand, were citizens of the United States other than Nebraska, and that the defendants were citizens of Nebraska. Its prayer was for a decree that the taxes were illegal and void, for an injunction restraining the treasurer from enforcing them and from selling any of the land, and restraining the company from paying the taxes, for a decree ordering the treasurer and the board to cancel the taxes and the record thereof on the books of the county, and for general relief. The gravamen of the Hunnewell bill was that the taxes were all of them illegal and void, for reasons set forth in the bill, and that the plaintiff was, and had been for more than four years, the owner and holder of 2316 shares of the stock of the company, and had requested its board of directors to take efficient measures to protect it from said illegal taxes, which request the board of directors refused, and the company was about to pay the taxes.

The decree of March 8, 1878, was as follows: "And now comes as well the said plaintiff, by his attorney, as the said defendants, by their attorneys, and thereupon this action comes on for trial before the court upon the issues joined between the parties; on consideration whereof, the court doth find the issue in favor of the plaintiff, and doth find that the taxes set forth in said petition of plaintiff are void, as in said petition the said plaintiff has alleged. It is therefore ordered and adjudged that an injunction be, and the same is hereby, allowed as prayed for in said petition of plaintiff, and the same is hereby made perpetual; and that the said defendants, the county commissioners and the treasurer of said county, or their successors, are hereby perpetually enjoined from collecting, or in any way attempting to collect, or in any way intermeddling with, the taxes set forth in said petition, and that the successors in office of the said defendants be, and the same are hereby, perpetually enjoined from collecting or in any way intermeddling with said taxes; and it is further considered that the said plaintiff recover against the said defendants his costs in and about this suit in this behalf expended, taxed to be — dollars."

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The bill filed June 9, 1883, further sets forth that the taxes were legal and valid, and had not any of them been paid, and were subsisting liens upon the lands. It further avers, that in January, 1878, the then county commissioners of Boone County and the county clerk thereof went from that county to the city of Lincoln, in Lancaster County, Nebraska, at the special instance and request of the railroad company; that at Lincoln, on January 30, 1878, the then county commissioners, pretending to act as the board of commissioners for Boone County, met with certain agents, attorneys and officers of the railroad company and with one Adam Smith, of Chicago, and those parties, confederating for the purpose of defrauding the county, undertook, fraudulently and without any authority of law, to enter into a stipulation or agreement, which the commissioners signed and delivered to the company. It is dated at Lincoln, January 30, 1878, and is signed by Thomas T. Wilkinson, chairman of the board of commissioners, by the other two commissioners, Edwin Broadbent and T. H. Bowman, and by M. H. Sessions as attorney for Boone County, and reads as follows: "Memorandum of an agreement made by and between the Burlington and Missouri River Railroad Company in Nebraska, first party, and the County of Boone, Nebraska, by its commissioners, of the second part, and the Nebraska Land and Live Stock Company, of the third part. Whereas parties of the first and third parts have this day entered into an agreement and bonds for the performance of certain obligations conditional on the absolute release by the second party of all illegal taxes levied upon the lands of the first and third parties in the county of Boone for the years 1873 and 1877, inclusive: Now, therefore, the party of the second part hereby agrees, by its commissioners and by its authorized attorney, M. H. Sessions, to enter into the necessary stipulation and to have decree of court entered up in the Circuit Court of the United States for the District of Nebraska, eradicating the whole of the taxes now charged against the lands of the first and third parties for the above years, all of said taxes having been examined and agreed upon as being illegal and void."

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The bill avers that there was no consideration for the agreement; that the commissioners acted as individuals and not as a board; that their action had no binding or valid effect; and that the pretended consideration for the agreement was the executing at the same time of two documents, for whose execution there was no warrant in law, and the commissioners had no authority to become parties thereto. One of these documents was dated January 30, 1878, and recited a contract made July 17, 1877, between the county of Boone, through its commissioners, and Adam Smith, wherein Smith agreed to purchase certain lands of the railroad company and pay all legal taxes thereon for the year 1878 and thereafter, and to make certain improvements in the county, in consideration of which the commissioners agreed, at some future day, to take the necessary legal steps for the wiping out of all the illegal taxes claimed to be due upon the lands of the company for the years from 1873 to 1877, both inclusive. It further recited that Smith was prepared to enter into the necessary obligations for the payment promptly thereafter of the legal taxes; that the commissioners had that day taken the necessary legal action to wipe out all the illegal taxes claimed to be due for those five years; and that Smith had transferred his rights to the Nebraska Land and Live Stock Company, which had assumed all his duties and obligations. By that document, the latter company bound itself to pay all legal taxes for the years 1878 to 1882 inclusive, which might be levied upon the lands purchased by it from the railroad company in Boone County, and bound itself also to pay all taxes which might be levied upon the lands of the railroad company in Nebraska for the years 1878 to 1882 inclusive, if the railroad company failed to pay them. By the other document, the railroad company bound itself to pay all legal taxes for the years 1878 to 1882 inclusive, upon all its lands in Boone County which had not been absolutely sold and deeded to the Nebraska Land and Live Stock Company, or to other parties.

The bill further avers, that at the same time and place, the commissioners, pretending to act for the county and as officers thereof, and intending to defraud the county out of said taxes,

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signed a writing purporting to be an employment of Sessions as attorney for the county. Such writing was dated January 30, 1878, and signed by Wilkinson, as chairman of the board, and by Broadbent and Bowman, the other two commissioners, and read as follows: "That whereas the taxes on the lands of the B. & M. R. R. Co. in Nebraska, in Boone County, both State and county and school taxes, are unpaid for the years 1873, 1874, 1875, 1876 and 1877; and whereas the said company dispute the legality of said taxes, and it is necessary to test their legality: Therefore, be it resolved, that the board employ M. H. Sessions as its attorney, to defend any suit that may be brought against the county, or to bring any suit he may deem best, to test the legality of said taxes, and if he deem that any of said taxes are illegal he may make such compromise in the matter with the said company as he may deem best for the interest of the county in the premises; and the said M. H. Sessions is hereby authorized to enter an appearance for the county of Boone, Nebraska, in any suit which may be brought by the said Burlington and Missouri River Railroad in Nebraska, or by any stockholder thereof, and to take action as directed by said commissioners, and to waive issuance and service of a subpœna in the case."

The bill avers, that, in signing such writing, the commissioners acted as individuals and not as officers of the county; that they had no authority to execute the writing or to confer upon Sessions the power pretended to be conferred upon him; that, to induce the commissioners to enter into such an arrangement, the railroad company and Smith agreed to pay and did pay all the expenses of the commissioners in going from Boone County to Lincoln and returning, and all their expenses at Lincoln; that the railroad company and Smith fraudulently induced the commissioners to pretend to employ Sessions as attorney for the county, on an agreement that the company and Smith would pay for his services; that Sessions was so employed by the railroad company and Smith as an attorney to act in their interest and against the interest of the county, while pretending to act as the attorney of the county; that his fees and expenses for so doing were agreed by the company

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and Smith to be paid by them; that in all he did, pretending to act as attorney and counsel for the county, he had acted for the company and its interests, in pursuance of such arrangement; that Hunnewell was a party to such fraudulent arrangements, and in pursuance thereof the suit was commenced in a collusive and fraudulent manner; that Sessions brought the bill to Omaha with the stipulation and a decree all prepared for entry, and filed the same, paying the fees therefor on behalf of the railroad company and Hunnewell; that the decree was null and void; and that the railroad company was the real plaintiff, and, fraudulently conspiring with the then board of county commissioners and with Sessions, caused the bill to be brought in the name of Hunnewell, for the sole purpose of obtaining jurisdiction for the bill in the court in which it was filed, all the other parties thereto being citizens of Nebraska.

The bill waives an answer on oath, and prays that the decree of March 8, 1878, be set aside as fraudulent and void, and that the taxes be declared valid and subsisting liens on the real estate, and for general relief.

The railroad company and Hunnewell put in an answer to the bill, taking issue on its material allegations. The answer also set up that, after the entry of the decree of March 8, 1878, the railroad company and the Nebraska Land and Live Stock Company expended large sums of money in getting persons to settle upon the lands, and commenced at once to sell them, the purchasers buying on the faith that the taxes were perpetually enjoined and not a lien upon any of the lands; that, since the decree was entered, and prior to the commencement of this suit, the railroad company, without any knowledge that Boone County intended to litigate or reopen the decree, had sold all of the lands, largely to actual settlers, who had moved in and taken possession of them, and had made valuable improvements on them, relying on the fact that the taxes were not a lien upon the lands; that the railroad company now owned none of the lands, but all of them had been deeded to other parties; that Adam Smith died some two years ago; that since the decree the railroad company has deeded 60,000 acres

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of the land to the Nebraska Land and Live Stock Company, and the latter company had sold the greater part of the land to actual settlers, who had settled upon the same in good faith, relying upon the fact that the taxes for the years 1873 to 1877, both inclusive, were not a lien upon it, and had put on it a large amount of improvements; that, as the county of Boone had allowed them to buy the land and settle upon it, and had taken no steps for a period of over five years after the decree was entered, it ought to be estopped, and its laches had been so great that it would be inequitable to set aside the decree, which would have the effect to create a lien upon all of said land so sold to, and settled upon by, the persons who had bought in good faith and knew nothing about any effort that would be made to set aside the decree; that, in June, 1880, the railroad company sold to the Chicago, Burlington and Quincy Railroad Company 77,229 acres of the land, the latter company having no knowledge that any effort would ever be made to set aside the decree, but purchasing in good faith, believing that the taxes in question were no liens upon the land; that it would not have purchased had it known that there would be any attempt to open up the decree; that, prior to the bringing of this suit, the last-mentioned company had sold 75,000 acres of the land, largely to actual settlers, mostly in tracts of 160 acres to each, and at much expense had induced persons to buy, relying on the fact that the taxes in question had been declared null and void, a large part of the lands sold by both of the railroad companies having been sold in 1879 and 1880; that, under the circumstances Boone County ought to be estopped, and its laches had been so great that it could not now disturb the settlers who had bought in good faith; that it ought not to maintain this suit, because it had failed to bring the same within four years from the time it discovered the pretended fraud set up in the bill; that it allowed over five years to elapse after it had full knowledge of the transaction as to the entry of the decree complained of, before it took any steps to annul the same; that it was barred of any relief by the statute of limitations of Nebraska, as well as by laches in not commencing this suit until the lands had been sold to

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parties who knew nothing about the circumstances under which the decree was entered; and that the board of county commissioners, and each one of them, and the officers and taxpayers of the county, had full knowledge of all the circumstances under which the decree of March 8, 1878, was entered, more than four years before this suit was brought.

There was a replication to the answer, proofs were taken, and the Circuit Court, on a hearing, dismissed the bill for want of equity, on the ground of laches on the part of the plaintiff. From that decree the plaintiff has appealed to this court.

The appellant contends (1) that the Circuit Court had no jurisdiction in the Hunnewell case; (2) that the taxes in question were valid; (3) that the proceedings to secure the decree cancelling the taxes were a fraud on the appellant and an imposition on the court; (4) that, if those proceedings were not void for fraud, they were void for want of legal authority in the board of county commissioners to stipulate that the decree be entered cancelling the taxes; and (5) that this suit is not barred by the statute of limitations or by laches.

We are of opinion that this suit was barred by the statute of limitations of the State of Nebraska and by laches, and that the bill was properly dismissed.

By section 12, of title 2, of chapter 57, of the General Statutes of Nebraska, of 1873, it is provided that an action for relief on the ground of fraud can only be commenced within four years after the cause of action shall have accrued, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. There is no allegation in the bill in this case that the county or its officers were, at any time after the entry of the decree of March 8, 1878, ignorant of the facts and circumstances connected with and attending its entry. The board of county commissioners consisted of three persons, of whom two were a controlling quorum. It appears from the evidence that the personnel of the board was changed on the 1st of January, 1879, more than four years and five months before this bill was filed, Wilkinson and Bowman having gone out of office by or before January

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1, 1879. There is no allegation in the bill, nor is there any proof, that the board of county commissioners was under hostile control down to a period within four years of the filing of the bill; nor is there any averment in the bill as to the time when the alleged fraud was discovered. The decree was a matter of public record. It decreed that the taxes generally were void, meaning all of them, as alleged in the bill filed by Hunnewell, and it granted a perpetual injunction against the collection of all the taxes. The parties who took part in the proceedings were accessible; Smith was then alive, and Sessions, who was examined as a witness in this case, could have been inquired of. *Stearns* v. *Page*, 7 How. 819; *Moore* v. *Greene*, 19 How. 69; *Beaubien* v. *Beaubien*, 23 How. 190; *Badger* v. *Badger*, 2 Wall. 87, 95; *Case of Broderick's Will*, 21 Wall. 503, 518; *Brown* v. *County of Buena Vista*, 95 U. S. 157; *Wood* v. *Carpenter*, 101 U. S. 135; *Graham* v. *Boston, Hartford &c. Railroad*, 118 U. S. 161; *Kirby* v. *Lake Shore &c. Railroad*, 120 U. S. 130; *Société Foncière &c.* v. *Milliken*, 135 U. S. 304; *Norris* v. *Haggin*, 136 U. S. 386, 392; *Mackall* v. *Casilear*, 137 U. S. 556, 566.

The appellant seeks to apply to the county and its officers in this case the established rule that laches will not be imputed to a government for a failure on the part of its officers to perform their duty. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Van Zandt*, 11 Wheat. 184; *United States* v. *Nicholl*, 12 Wheat. 505; *Dox* v. *Postmaster General*, 1 Pet. 325; *Gaussen* v. *United States*, 97 U. S. 584. But this doctrine is not extended to such a municipal corporation as the county of Boone. *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 11, 12. The principle of ratification by laches or delay is as applicable to such a municipal corporation as it is to a private corporation or to an individual person. 1 Dillon on Municipal Corporations, 4th ed. § 548; *Clark* v. *City of Washington*, 12 Wheat. 40; *School Directors* v. *Georges*, 50 Missouri, 194; *City of Cincinnati* v. *Evans*, 5 Ohio St. 194. The statute of limitations of Nebraska makes no exception in favor of such a municipal corporation as the county of Boone, and the doctrine of laches applies to it and to its board of county commissioners.

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Syllabus.

By the General Statutes of Nebraska, of 1873, chapter 13, section 1, the county was made a body corporate, and it was provided by section 4 that suits by or against it should be brought by or against the board of county commissioners of the county, and, by other provisions, power was conferred upon the board to levy and collect taxes. It, therefore, had authority to act for the county in respect to the collection of taxes. Indeed, that is its only authority for the bringing of the present suit, coupled with the provision found in section 93, of chapter 13, of the General Statutes of Nebraska, of 1873, that the county commissioners are authorized to employ attorneys in any case, either civil or criminal, in which their county is interested, when the cause is taken to the Supreme Court of the State, or before any United States court, and are authorized to pay a reasonable compensation for such services.

Decree affirmed.

MR. CHIEF JUSTICE FULLER did not sit in this case, or take any part in its decision.

REDFIELD *v.* BARTELS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 269. Argued March 30, 1891. — Decided April 20, 1891.

On the 16th of November, 1863, plaintiffs brought suit to recover customs duties illegally exacted, laying the *ad damnum* at $1500. On the 8th of January, 1881, they amended their claim, increasing the *ad damnum* to $20,000. There was no interest count in the declaration, and it was doubtful whether interest was at first specially declared for in any way. No account was rendered or demand made prior to the commencement of the suit, nor was any bill of particulars furnished at that time. On the 11th of May, 1882, a bill of particulars was for the first time served. The court below gave judgment for $14,394.95, with interest from the date of the several payments. *Held*, on the facts set forth at length in the opinion, showing laches on the part of plaintiffs, that they were only entitled to judgment for $1500 with interest from November 16, 1863, and $12,894,95, with interest from January 8, 1881.

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THE case is stated in the opinion

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. S. F. Phillips and *Mr. F. D. McKenney* for defendants in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This suit was brought by George F. W. Bartels and others in the New York Supreme Court, November 12, 1863, against Redfield, then late collector of the port of New York, to recover back the sum of fifteen hundred dollars duties at the rate of forty per cent under Schedule B of the act of July 30, 1846, 9 Stat. 42, c. 74, that had been unlawfully assessed on charges for inland transportation on a large number of importations of champagne wine invoiced from Rheims, and exported from the port of Havre, and on one-half of one per centum excess of commissions on the said importations. Service was made November 16, 1863, and notice of appearance given, and bill of particulars and copy of complaint demanded by defendant, and the suit removed to the Circuit Court of the United States for the Southern District of New York by certiorari on February 20, 1864.

The declaration was filed March 30, 1864, and consisted of the common counts, alleging an indebtedness in the sum of $1500, for money lent and advanced; paid, laid out and expended; had and received; and due upon an account stated; and the *ad damnum* was placed at $1500. On April 20, 1864, the defendant filed a plea of the general issue, and on the next day, April 21, a jury was called and sworn in this and some other cases, and a verdict rendered in these terms:

"By consent of counsel the jury find a verdict for the plaintiffs in the above-entitled action for excess of duty with interest thereon illegally exacted from plaintiffs and paid under protest to defendant, and not barred by the statute of limitations, on commissions over one and one-half per centum on merchandise imported by the plaintiffs at New York, from

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Great Britain; on commissions over two per centum on merchandise imported by plaintiffs at New York from the Continent of Europe (except Paris); on the discount of two and one-half per centum disallowed on linens imported at New York from Ireland; on charges on merchandise imported at New York from Ireland; on charges on merchandise imported at New York for the transportation of the goods from the interior of the country by railroad or water carriage incurred prior to the time of exportation; on coastwise and transportation charges from Ireland and Scotland to England on merchandise imported at New York from Ireland and Scotland via England; and on additions to make market value of said merchandise at London and Liverpool; on transportation charges from the Continent of Europe to Great Britain, on merchandise imported at New York from the Continent of Europe via Great Britain; on merchandise imported by the plaintiffs at New York, and invoiced in Bremen thalers, by the Bremen thalers having been computed in assessing duties at a higher rate than seventy-one cents, the rate at which it should by law have been computed; the amount of excess of duties exacted from the plaintiffs, and paid to the defendant, and embraced in the plaintiffs' bill of particulars to be adjusted by the clerk of the court or his deputy. It is expressly stipulated that in case it shall appear on the adjustment or otherwise in any case that the suit was not brought within the time prescribed by statute of limitations, or that the question of timeliness of protest, or the question of a sufficiency of a continuous or prospective protest shall be involved, the verdict shall be opened and opportunity to appeal be given to, and at the option of the district attorney.

"A certificate of probable cause to be entered in each case.

"The right to appeal or writ of error as above not to be reserved to the district attorney, unless the amount involved be sufficiently large to allow such writ of error."

March 16, 1865, it was ordered: "That all the orders heretofore made by this court, referring certain suits against the collector of the port of New York to the clerk of this court for adjustment, be and the same are hereby revoked, except

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as to such cases the adjustment of which was actually commenced before him." July 1, 1865, this and other suits were referred by Judge Nelson to the collector of the port for adjustment. November 20, 1874, an order was entered: "That the referee therein, in adjusting any of the above causes, shall not exclude from this report any item or items for the reason that said item or items were paid more than six years before the commencement of suit, unless it shall appear that the statute of limitations was duly pleaded by the defendant in each case, and the referee is instructed to include such items in his reports and statements, unless the statute has been pleaded." Mr. Redfield having died July 22, 1877, and letters testamentary having issued to Constance C. Redfield and Frank B. Redfield, the latter, as executrix and executor, were substituted, May 22, 1880, as defendants. On the 8th of January, 1881, against the opposition of the government, plaintiffs were given leave to amend the summons and declaration by increasing the damages therein set forth to $20,000, and interest from the dates of payment, and an amendment thus increasing the indebtedness claimed, and the amount named in the *ad damnum*, with interest, was made accordingly on the face of the original papers. On the 11th of May, 1882, plaintiffs served a bill of particulars, notifying the defendants that the plaintiffs' claim "is for excess of duty paid on charges and commissions on all importations made into New York on which duties were paid to the defendants between November 1, 1853, and July 1, 1857," and giving a list of the importations. June 30, 1882, the case, with others, was referred to the clerk of the court for adjustment, according to the verdict, of the plaintiffs' claim, upon the bill of particulars served. On the 19th of September, 1882, a rule to show cause why the defendants should not be allowed to set up as additional defences the pendency of another suit for the same cause or causes of action, *res adjudicata*, and payment, was entered, but was vacated on the 20th of October. December 15, 1882, the referee made his report, to which defendants filed exceptions, which were heard March, 28, 1883, and on the 4th of April, 1883, sustained. The opinion of the circuit judge will

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be found in 16 Fed. Rep. 336. A rehearing was granted and had March 4, 1884; the report was recommitted on the 16th of May, 1884, and an additional report was filed June 1, 1885, finding that the amount due plaintiffs was $14,394.95 principal and $29,988.55 interest, to the date of the report. This report was confirmed April 19, 1886, and interest directed to be computed from the date of the report to the date of entry of judgment. Judgment was signed October 3, 1887, for $51,302.48. A bill of exceptions was taken, and the case brought here on writ of error.

The order of May 16, 1884, recommitting the report, directed, among other things, "that the referee receive such evidence as the parties may present respecting the existence of laches which may affect the right of plaintiffs to recover interest under the decision of the Supreme Court in the case of *Redfield* v. *Ystalyfera Iron Co.*'" The referee transmitted the evidence taken before him bearing upon that question, and reported that he failed to see any good and substantial grounds for a finding of laches on the part of plaintiffs, which ought to deprive them of interest, and he therefore found and reported that interest should be included in the judgment. The bill of exceptions contains the evidence adduced before the referee, his report, and twenty-nine specific findings of fact, made at the request of the plaintiffs, and a finding, "as a conclusion of law," likewise so requested: "That the plaintiffs have not been guilty of laches, but have used reasonable diligence in the prosecution of this action and are entitled to interest on the amount of principal found due by the referee from the several dates of payment." And also thirty-six findings of fact as requested by the defendants, and a refusal of one finding of fact so requested, as well as refusals to find, as "conclusions of law," that the plaintiffs "have been guilty of gross laches in prosecuting this action," and "are not entitled to recover any interest whatever in this action." To this report and the decisions of the referee the plaintiffs and defendants severally filed exceptions, those of plaintiffs relating to certain refusals to find not material here. The defendants excepted to various findings by the referee in accordance with

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plaintiffs' requests, and to specific conclusions relating to laches and the allowance of interest; to the referee's refusal to find as requested by defendants, "that there is no evidence in this action that these plaintiffs, or any one in their behalf, from July 1, 1865, until about April or May, 1882, when this action was referred to the present referee, have made any application to the collector of the port, as such referee as aforesaid, to have this action so adjusted," though the referee did find that "there is no evidence in this action that these plaintiffs or any one in their behalf, from April 1, 1864, until somewhere about June 30, 1882, ever made any application to this court, or a judge thereof, to have this action adjusted pursuant to the verdict therein." The defendants also excepted to the referee's refusal to find the conclusions of law requested by them. The exceptions of the parties were heard and overruled April 17, 1886. The opinion of the Circuit Court is reported, 27 Fed. Rep. 286. The order for judgment is dated April 19, 1886. Judgment was signed October 3, 1887, as before stated. To this order and the decision of the court embodied therein the defendants duly excepted, in so far as the same overruled the defendants' exceptions as to the allowance of interest in the case.

In the view which we take, we do not deem it necessary to recapitulate the various findings of fact by the referee. It should be said, however, that it appeared, among other things, therefrom, that a suit was commenced by plaintiffs in 1860 to recover excesses of duty paid on charges and commissions from November 1, 1853, to July 1, 1857, in which judgment was finally entered February 17, 1864, which was paid April 7, 1864; and that after the judgment was paid certain missing entries and invoices were found in the record room of the custom-house, and the referee held that it was through no fault of the plaintiffs that the amounts sought to be recovered in this suit were not included in the prior action, which covered practically the same period of time, and that if the omission to include the amounts in the former suit had been through any fault or negligence of the plaintiffs it was cured by the verdict entered April 21, 1864, by consent.

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We agree with the Circuit Court that the consent verdict may be properly treated as a stipulation, and that it precluded the defendants from denying that the plaintiffs were entitled to recover excess of duties illegally exacted by and paid under protest to the defendants' testator; and that under the circumstances, the defence of the former suit, judgment and payment could not be availed of. And while by that so-called verdict the defence of the statute of limitations was expressly reserved, yet, on the 20th of November, 1874, it was ordered that items barred by the statute should not be excluded from the recovery except in cases where the statute had been pleaded, and as that order was not objected to, nor exception taken at the time, the court correctly assumed that the government had waived the stipulation so far as intended for its protection in that regard, and hence that there could be a recovery of the items named in the bill of particulars in this case, notwithstanding they were all barred upon the face of this record under the statute of limitations of New York then applicable. *Barney* v. *Oelrichs*, 138 U. S. 529. When that verdict was consented to, plaintiffs asserted an indebtedness of $1500, and nearly seventeen years afterwards, on the 8th of January, 1881, they were permitted by amendment to raise the amount of the alleged indebtedness from $1500 to $20,000 and interest, and no exception seems to have been taken to the granting of that amendment. The bill of particulars was served on the 11th of May, 1882. These are matters of record and were also found by the referee. Treating the findings of fact and conclusions of law of the referee, and the action of the court in passing upon the exceptions to the referee's report and findings, as adopting the referee's conclusions, and to be considered either as a special verdict or as findings of fact and conclusions of law by the court, the same having been duly excepted to, the question arises whether the judgment rendered is justified by those findings. If upon the facts the court had instructed a jury to find the interest allowed in this case, and such an instruction had been excepted to, or if the case had been submitted to the court for trial, and findings of fact and conclusions of law had been

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made accordingly, the question whether there was error resulting in the judgment as rendered would be open to us; and we hold that this is so upon this record.

In *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176, the court, speaking by Mr. Justice Matthews, said: "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages, it is often matter of discretion. In cases, like the present, of recoveries for excessive duties paid under protest, it was held, in *Erskine* v. *Van Arsdale*, 15 Wall. 75, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal exaction. But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld." That was the case of an action begun on December 30, 1854, to recover from the collector of the port of New York money alleged to have been illegally exacted by him for customs duties and paid under protest, and, on the 15th of December, 1856, a verdict was taken by consent in the sum of $1500, subject to adjustment at the custom-house as to the amount. Judgment was finally entered August 22, 1883. The case made, which, by the terms of the verdict, either party was at liberty to turn into a bill of exceptions, set forth the entire evidence, but was not an agreed statement of facts, nor a special verdict, nor a finding of facts by the court, and contained no exceptions. It could not, therefore, be treated as the basis for an assignment of errors, but this court, notwithstanding, held that the Circuit Court erred in allowing interest from December, 1854, until August, 1883, a period of nearly twenty-nine years, because the delay in the prosecution of the suit was to be attributed to the plaintiff below. This was in view of the fact that "the verdict was purely formal, and was entered by consent, after the hearing of the evidence, merely as a basis for further

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proceedings, which were to consist in an adjudication by the court of the questions of fact and law arising upon the testimony, and liquidation of the amount to be recovered in case the legal liability was found to exist."

In *United States* v. *Sanborn*, 135 U. S. 271, 281, *Redfield* v. *Ystalyfera Iron Co.* was cited with approval, and the court said: "That the same rule should be applied against the government when, in a case like the present one, it has long delayed an assertion of its rights, without showing some reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him."

In the case at bar, the findings give the grounds upon which the referee and the court concluded that the delay which had intervened was not fairly attributable to the plaintiffs, and the Circuit Court said that it "arose mainly from complications incident to the fact that the suit was one of a very large number of similar suits in which questions affecting the defendants' liability were being litigated from time to time with varying results; that any recovery which plaintiffs might have obtained would not have been acquiesced in by the government, but would have been further litigated; and that their claim was to that extent involved with the trials and results of the other suits that it was reasonable to postpone the trial in prospect of an adjustment, which at times seemed to be near at hand, but was constantly deferred by the vacillating action of the officers of the government."

We are satisfied, however, that the judgment cannot be sustained upon those grounds. The indebtedness plaintiffs set up on the 16th of November, 1863, when the summons was served, was $1500. The indebtedness they were permitted to claim on the 8th of January, 1881, was $20,000. The amount of principal found by the referee, and for which judgment was entered, was $14,394.95. Interest was allowed from the date of the several payments aggregating that amount, (all of which were made between November 1, 1853, and July 1, 1857,) to June 1, 1885, and from that date to the third of October, 1887, when judgment was signed for $51,302.48. The

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bill of particulars was not, as we have said, served until May 11, 1882.

All of the items sought to be recovered were barred by the statute of limitations. A suit had been brought as early as 1860 upon the same cause of action, had gone to judgment, and the amount had been promptly paid, but plaintiffs were nevertheless permitted to recover in this action upon the ground that these collections had not actually been included in the former recovery, and that the consent, verdict or stipulation waived the defence of *res adjudicata*. Whether the $1500 originally sued for contained interest, or what particular items were included, does not appear. There was no interest count, and it is doubtful if interest was at first specially declared for in any way. No account was rendered or demand made prior to the commencement of the suit, nor was any bill of particulars furnished at that time.

As interest was recoverable as damages only, upon the principle of wrongful detention of the debt, or of unreasonable and vexatious delay in payment, we are not inclined to regard the debtor as in default for inability to inform the creditors of the extent of the deprivation of which they might complain; but, on the contrary, hold that the lack of diligence on the part of plaintiffs in the assertion of their claim was so great that no interest should have been allowed from anterior to the commencement of the suit, and that such allowance must be limited by the date of service and of the amendment which enabled plaintiffs to recover the larger amount, and to the sums claimed at those dates, respectively. The total principal awarded was $14,394.95, or $12,894.95 after deducting $1500.

The judgment is reversed, and the cause remanded, with a direction to the Circuit Court to enter judgment for $1500 and interest from November 16, 1863, and for $12,894.95 with interest from January 8, 1881.

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APPENDIX.

AMENDMENTS TO RULES.

IN THE SUPREME COURT OF THE UNITED STATES.

MAY 11, 1891.

Ordered, That the following be adopted as Rules of this Court under the act approved March 3, 1891, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

Strike out "Rule 35," and insert instead thereof the following:

RULE 35.

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*,

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whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6 and 9 of Rule 10.

Rule 36.

APPEALS AND WRITS OF ERROR.

1. An appeal or a writ of error from a Circuit Court or a District Court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any Justice of this court, or by any Circuit Judge within his circuit, or by any District Judge within his District, and the proper security be taken and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the Circuit Court or District Court, or any Justice or Judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

Rule 37.

CASES FROM CIRCUIT COURT OF APPEALS.

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the

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party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant, as part of the application.

Rule 38.

INTEREST, COSTS, AND FEES.

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act.

The following orders are hereby promulgated by this court:

Ordered, That, under section 15 of the act approved March 3, 1891, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," the Territories of Alaska and Arizona are assigned to the Ninth Judicial Circuit, and the Territories of New Mexico, Oklahoma, and Utah are assigned to the Eighth Judicial Circuit.

Ordered, That Rule 67 of the Rules of Practice in Equity, as amended at December term, 1861, be amended by inserting after the words "in special instances" the words "in which instances it shall be taken down by a stenographer and be put into typewriting or other writing"; and by adding the following at the end of the amendment to Rule 67 of the Rules of Practice in Equity promulgated at December term, 1869: "The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party who makes the examination or cross-examination of the witness, as the case may be, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them."

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ABSENT DEFENDANT.

1. A provision in a statute authorizing notice to be given to an absent defendant to appear, by publishing the same in a newspaper once a week for four months, is not satisfied by a publication once a week for four lunar months; but the word "month" when so used signifies a calendar month. *Guaranty Trust &c. Co.* v. *Green Cove Springs &c. Railroad Co.*, 137.
2. To support a decree for foreclosure against an absent defendant brought in by publication, publication for the full period required is necessary. *Ib.*

ADMIRALTY.

See JURISDICTION, A, 7.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A deed of assignment for the benefit of creditors, recited the indebtedness of the assignor, his inability to pay his debts with punctuality or in full and his desire to make "a fair and equitable distribution of his property among all his creditors," and provided that the assignor "has bargained, sold and assigned, and does hereby grant, convey and assign," unto the assignee "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule A, or intended so to be. . . . Schedule B, hereto annexed, contains, as near as I can state, a list of all my creditors and the amount of their respective demands, and both of said Schedules A and B are hereby made part of this assignment." Schedule A, annexed to the assignment, contained an inventory of certain real estate, and a list of persons indebted to the assignor, and was verified by his oath to the effect that it contained a true list of the assignor's creditors and the amount of their respective demands. But it contained no clause or provision which, by any construction, embraced a stock of goods worth about $10,000, and constituting, at the time, the bulk of the assignor's estate. *Held*, That the title to these goods did not pass to the assignee, and remained subject to attachment as the property of the assignor. The general description in the assignment of the property conveyed is limited by the particular

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description immediately following in the same clause referring to Schedule A. *Bock* v. *Perkins*, 628.

2. The statutes of Iowa relating to assignments for the benefit of creditors refer to *general* assignments, by which the assignor makes a disposition of all his property for the benefit of all his creditors. They do not relate to partial assignments which are permissible under the laws of that State. *Ib.*

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. The mere renewal of a negotiable promissory note does not, as between the original parties, affect the essential nature of the transaction represented by it. *King* v. *Doane*, 166.

2. If, in an action by an endorsee against the maker of a negotiable promissory note, the note is shown to have been obtained by fraud, the presumption, arising merely from the possession of the instrument, that the holder in good faith paid value, is so far overcome that he cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he in fact purchased for value. *Ib.*

3. The rule which protects a *bona fide* holder for value of commercial paper against defences or equities, that might be good, as between the original parties, does not require that the holder shall have paid full value: but if the amount paid is greatly disproportioned to the real value, the security may be regarded as having been obtained without paying anything for it. *Ib.*

4. King agreed to take $10,000, par value, of the capital stock of a corporation being organized, and to pay $6666.66 for it. He executed his promissory note for the latter amount that it might be discounted and the proceeds applied on his subscription, his stock to be held as security until the note should be paid. Doane, who had already subscribed and paid his subscription, surrendered 100 shares to the company, which were allotted to King, and a certificate issued to him therefor, which certificate, being endorsed by him in blank, was given, with the note, to Doane as security for the payment of it, in consideration of his surrender of the 100 shares. At maturity the note not being paid, a note of $7118.50 was given in renewal. King being sued on the renewal note, set up that he had been induced to make the subscription by false and fraudulent representation on the part of an agent of the company, and that Doane had not paid full value for the note. *Held*, that Doane had purchased the original note for value, and without knowledge or notice of any fraud or bad faith in the transaction, and could recover. *Ib.*

CASES AFFIRMED OR APPLIED.

1. *Buck* v. *Colbath*, 3 Wall. 334. *Etheridge* v. *Sperry*, 266.

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2. *Frelinghuysen* v. *Key*, 110 U. S. 63, affirmed and applied. *Boynton* v. *Blaine*, 306.
3. The cases of *Elgin* v. *Marshall*, 106 U. S. 578, and *The Jessie Williamson, Jr.*, 108 U. S. 305, cited and applied. *The Sydney*, 331.
4. *Winans* v. *Denmead*, 15 How. 330, affirmed and applied. *Western Electric Co.* v. *La Rue*, 601.

CASES DISTINGUISHED.

1. *Cooper* v. *Reynolds*, 10 Wall. 308, distinguished. *Guaranty Trust &c. Co.* v. *Green Cove Springs &c. Railroad Co.*, 137.
2. The case of *Elgin Watch Co.* v. *Spalding*, 19 Fed. Rep. 411, distinguished. *Worthington* v. *Robbins*, 337.
3. *United States* v. *Arredondo*, 6 Pet. 691, and *Gonzales* v. *Ross*, 120 U. S. 605, distinguished from this case. *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 569.
4. This case distinguished from *Calton* v. *Utah*, 130 U. S. 83. *Davis* v. *Texas*, 651.

CERTIFICATE OF DIVISION IN OPINION.

1. Two questions in a certificate of division in a criminal case were not answered, because they were too general, one being whether a demurrer to an indictment ought to be sustained, and the other being whether the matters alleged in the indictment constituted an offence under the statute of the United States. *United States* v. *Brewer*, 278.
2. A question was not answered, because the answers to other questions disposed of the case. *Ib.*

CHATTEL MORTGAGE.

There is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each State as decisive in respect to any case arising therein. *Etheridge* v. *Sperry*, 266.

See LOCAL LAW, 8.

COMMON CARRIERS.

See NEGLIGENCE, 1, 2, 3;
RAILROAD, 1, 2, 3, 4.

CONSTITUTIONAL LAW.

1. By the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting

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the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Leeper* v. *Texas*, 462.

2. A person is not denied the equal protection of the laws, nor deprived of liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution, by being tried and sentenced to imprisonment by a judge who, although appointed by the governor without authority, is a judge *de facto* of a court *de jure*, by the law of the State as declared by its highest court. *In re Manning*, 504.

3. An ordinance passed by the city of New Orleans, under authority conferred by the legislature of Louisiana, prohibiting the keeping of any public market within six squares of any public market of the city, under penalty of being sentenced, upon conviction before a magistrate, to pay a fine of twenty-five dollars, and to be imprisoned for not more than thirty days if the fine is not paid, does not violate the Fourteenth Amendment to the Constitution of the United States. *Natal* v. *Louisiana*, 621.

See FISHERIES;
HABEAS CORPUS;
PRACTICE, 1.

CONTRACT.

1. Under an indenture in the nature of a lease which includes railway sleeping cars and written contracts for letting them to certain railroad companies, and which provides that if the revenue derived from such contracts shall, by reason of the refusal of any of the railroad companies to permit the cars to be run over their lines of road, fall below the sum agreed in the indenture to be paid quarterly by way of annual rent, the lessee "shall have the right either to declare this contract null and void and surrender" to the lessor the property leased, "or shall and will pay in like manner, in lieu of said sum, such sum or share of the net revenue from the remaining lines of the roads as the parties hereto may at that time agree upon," the lessee, if he makes no election, in case of the revenue, by reason of such refusal of the railroad companies, falling below the sum first mentioned, is no longer liable for that sum, but only for such share of the net revenue from remaining railroads as the parties may at that time agree upon, and, if they do not agree, for a sum to be assessed by the jury in the nature of a *quantum meruit*, not exceeding the whole of such net revenue. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 62.

2. The Pullman Southern Car Company, operating drawing-room and sleeping cars, hired ten of such cars to a railroad company at the compensation of three cents per mile per car for every mile run by its cars upon the lines of the railroad company. The railroad company agreed, when requested, to repair the cars furnished under the contract as it might become necessary, and, without request, to make such repairs as

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were required to insure their safety, rendering bills monthly to the Pullman Company and charging for such repairs only the actual cost of the material and labor expended. The railroad company assumed responsibility for damages to the cars occasioned by "accident or casualty" while the sleeping car company assumed responsibility for loss or damage arising from defective heating apparatus or lights furnished by it. The latter company was to have the exclusive right for fifteen years to furnish drawing-room and sleeping cars on all passenger trains of the railroad company, the latter binding itself not to contract with any other party to run said class of cars on and over its lines during that period. If either party failed to keep and perform its covenants the one not in default could, upon written notice, declare the contract at an end. The railroad company had the option to terminate the contract at the end of five, eight or eleven years, upon written notice served six months before the date fixed for such termination. Two of the sleeping cars, the Louisiana and Great Northern, were entirely destroyed by fire originating "from a cause unknown;" the former at the time of the fire being on the railroad track under a depot shed used by the railroad company to store cars when not in actual transit, and the latter being in a shop belonging to the railroad company, known as the Pullman repair shop, which had been assigned to the exclusive use of the sleeping car company as a place where it could repair its own cars. This shop at the time of the fire was in the possession of the Pullman Company, the railroad employés having no access thereto. The Great Northern had been in that shop for repairs by its owner for six months before the fire, and but for the fire would have been in condition to have been again put in actual use by the railroad company on the day succeeding the fire. Both the Louisiana and the Great Northern were insured by the Pullman Company. After the fire the insurance companies paid $19,000 in full settlement of the loss and damage, and this action was brought by the Pullman Company against the railroad company to recover the value of the burned cars under an agreement between it and the insurance companies that the recovery should be equally divided by them. There was a verdict and judgment for the plaintiff. *Held*, (1) The fire having "originated from a cause unknown" the losses were, within the meaning of the contract, "occasioned by accident or casualty." (2) The collection of the insurance money did not affect or impair the right of the sleeping car company to recover the amount of the loss according to the contract with the railroad company. Upon payment of the loss, or to the extent of any payment by them on account of the loss, the insurance companies were subrogated to the rights of the insured, and could in its name, or in their joint names, maintain an action against the railroad company for indemnity, if the latter was liable to the insured for the loss of the cars; this, because the liability of the railroad company was, in legal effect, first and principal, and that of the insurer

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secondary, not in order of time, but in order of ultimate liability. (3) The contract was not void as being in general restraint of trade or against public policy. The contract is to be interpreted in view of the condition implied by law that the sleeping car company should furnish cars not only adequate and safe, but sufficient in number for the use of the public travelling over the lines of the railroad company. Such condition was not and could not have been dispensed with. Whether the agreement is so far divisible that the stipulation giving the sleeping car company exclusive rights, and binding the railroad company not to make similar contracts with other parties during the stipulated term could be separated from the other provisions, *quære*. (4) The railroad company was responsible for the loss of the Louisiana because it was in active service under the contract, and was in the possession and under the exclusive control of the railroad company for the purpose simply of being cleansed and resupplied for another trip whenever the railroad company chose to put it into service. (5) The railroad company was not liable for the loss of the Great Northern, because that car at the time of the fire was in the exclusive possession of the sleeping car company and, when burned, was not subject to be used by, nor under the supervision of, the railroad company. *Chicago, St. Louis & New Orleans Railroad Co.* v. *Pullman Southern Car Co.*, 79.

3. In an action to recover the contract price for putting up mill machinery anticipated profits of the defendant resulting from grinding wheat into flour and selling the same, had the mill been completed at the date specified in the contract, cannot be recovered by way of damages for delay in putting it up. *Howard* v. *Stillwell & Bierce Manufacturing Co.*, 199.

4. As a general rule, subject to well established qualifications, anticipated profits, prevented by the breach of a contract, are not recoverable as damages for such breach; but, where such profits, which would have been realized had the contract been performed, and which have been prevented by its breach, are not open to the objection of uncertainty or remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into, they are so recoverable. *Ib.*

See CORPORATION, 6;
INSURANCE, 3;
NATIONAL BANK, 1.

CORPORATION.

1. A corporation, formed by articles of association, called a certificate or charter, under the general laws of Pennsylvania concerning manufacturing companies, with a certain capital stock, for twenty years, for

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"the transportation of passengers in railroad cars constructed and owned by the said company" under certain patents, carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting the cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers. Seven years afterwards, by a special act of the legislature of Pennsylvania, the charter was extended for ninety-nine years, and the corporation was empowered to double its capital stock, and "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal property." The corporation forthwith entered into an indenture with a corporation of another state engaged in a similar business, by which it leased and transferred to that corporation all its cars, railroad contracts, patent rights and other personal property, moneys, credits and rights of action, for the term of ninety-nine years, except so far as the contracts and patents should expire sooner; and covenanted not to "engage in the business of manufacturing, using or hiring sleeping cars" while the indenture should remain in force; and the lessee covenanted to pay all existing debts of the lessor, and to pay to the lessor annually the sum of $264,000, during the entire term of ninety-nine years, unless the indenture should be sooner terminated as therein provided. *Held*, That this contract was unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of its duty to the public; and therefore no action could be maintained by the lessor upon the contract, or to recover the sums thereby payable, even while the lessee had enjoyed the benefits of the contract. *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 24.

2. In 1872, an Iowa railroad corporation, being indebted to a construction company in the sum of $70,000 which it was unable to pay in money, had a settlement with the latter, whereby the debt was paid in shares of the stock of the railroad company of the par value of $350,000. The stock was taken at 20 cents on the dollar, but was not, at the time, worth anything in the market. Greene, a member of the construction company, received 910 shares as his part. Subsequently, in 1876, the railroad and its appurtenances were sold under a decree foreclosing a mortgage given to secure the bonds of the railroad company. Clark, a holder of bonds issued by the railroad company in 1874, obtained judgment for the amount due him, upon which execution was issued and returned in 1880, no property. Greene having died, Clark brought suit against his administrator in one of the circuit courts of Iowa, sitting in probate, to hold his estate liable for the difference between what was paid for the stock, and its face value, upon the ground that the stock of the corporation was a trust fund for creditors, and that as between creditors and stockholders, the latter was bound to account for its face value. Upon the petition of Clark, the case was removed

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to and tried in the Circuit Court of the United States, where a verdict was returned by direction of the court for the defendant. *Held*, (1) That as the proceeding involved a judicial determination of the liability of Greene's estate for the claim in question, with parties before the court to contest all questions of law and fact, it was a "suit" within the meaning of the act of Congress providing for the removal of suits from the state courts. It is not competent for a State by legislative enactment conferring upon its own courts exclusive jurisdiction of proceedings or suits involving the settlement and distribution of the estates of deceased persons, to exclude the jurisdiction in such matters of the courts of the United States, where the constitutional requirement as to citizenship of the parties is met; (2) That the value of the matter in dispute here is the amount of the claim the plaintiff seeks to establish, and that amount being in excess of $5000, without costs, this court has jurisdiction without reference to any inquiry as to what might be ultimately realized from Greene's estate, if the claim be established; (3) That the estate of Greene is not liable for the face value of the stock by reason of the statute of Iowa providing that nothing therein contained "exempts the stockholders of any corporation from individual liability to the amount of the unpaid instalments on the stock owned by them or transferred by them for the purpose of defrauding creditors, and execution against the company may to that extent be levied upon such private property of any individual." Revision of Iowa, 1860, sec. 1172; Code of 1873, sec. 1082; (4) That whether a stockholder in law or in fact, owed to the corporation any sum on the stock held by him, was left by the statute to be determined in each case, upon its own circumstances, and in accordance with the principles of general law touching the rights and liabilities of creditors and stockholders. *Clark* v. *Bever*, 96.

3. While the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund *sub modo* for the benefit of its general creditors, a corporation — no statute forbidding — may in good faith sell or dispose of its stock to creditors in discharge of their debts. *Ib.*

4. The principle reaffirmed that when the interest of the public or of a stranger is to be affected by any transaction between the stockholders owning a corporation and the corporation itself, such transaction is subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it will be disregarded or annulled so far as it inequitably affects him. Therefore, when the interest of creditors requires, those holding shares in a corporation purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares, unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint. *Ib.*

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5. It is the settled doctrine of this court, as well as of the Supreme Court of Missouri, that unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of creditors, which may not be given away or disposed of by it, without consideration or fraudulently, to the prejudice of creditors. *Fogg* v. *Blair*, 118.

6. While it is competent for a railroad corporation in Missouri, exercising good faith, to use its bonds and stock in payment for the construction of its road, it could not rightfully, at least, as against creditors or stockholders, issue its stock to contractors as full paid, without getting some fair or reasonable equivalent for it. What is such equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them. The corporation could not, by its directors, sell or dispose of its assets to the prejudice of creditors and stockholders, under such circumstances, on such terms, and at such prices as indicated upon the face of the transaction, that they were being squandered recklessly or fraudulently in disregard of the trust committed to them. *Ib.*

7. When a charter power is once fully exercised by a corporation, and exhausted, it is, in respect of further contracts and rights of the corporation, as if it had never been granted. *East Tenn. Virginia &c. Railway* v. *Frazier*, 288.

8. The plaintiff in error having exhausted the power to mortgage its property given by the act of 1847, before its property was mortgaged in 1881, the latter mortgage was made under the then existing laws of Tennessee. *Ib.*

9. The failure to enter a vote of stockholders in a corporation in the corporation records at the time when it was adopted does not affect its validity. *Handley* v. *Stutz*, 417.

10. A resolution of stockholders in a corporation organized under the laws of Kentucky to increase the capital stock of the corporation, passed at a meeting held without the limits of that State, is binding upon the members present and voting for it. *Ib.*

11. An increase by a Kentucky corporation of its capital stock within the amount authorized by law is not invalidated by reason of the fact that no amendment of the charter authorizing such increase was ever recorded or published, as required by the laws of that State. *Ib.*

12. When a stockholder in a corporation who assents to an increase in the capital stock of the corporation, and its gratuitous distribution among the shareholders, receives such stock as full paid stock, an obligation arises to pay for it in full, when called upon to do so by creditors whose debts are subsequent to the authorization of the increase: but this equity does not exist in favor of a creditor whose debt was contracted prior to such authorization. *Ib.*

13. An active corporation, finding its original capital impaired by loss or

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misfortune, may, for the purpose of recuperating itself and of producing new conditions for the successful prosecution of its business, issue new stock, and put it upon the market, and sell it for the best price that can be obtained: and in such case no such trust in favor of a creditor arises against the purchaser who, in good faith, buys for less than par. *Ib.*

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

COURT AND JURY.

The court may withdraw a case from the jury, and direct a verdict for plaintiff or defendant, as the case may be, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it. *Delaware, Lackawanna &c. Railroad Co.* v. *Converse*, 469.

COURT OF CLAIMS.

See JURISDICTION, C.

CUSTOMS DUTIES.

1. "White hard enamel," imported in 1884, and used for various purposes when a smooth or enamelled surface was desired, including the making of faces or surfaces of watch dials, the form or condition of it, as imported, affording no indication of the use to which it was to be applied, and it requiring to be ground or pulverized, and new processes of manufacture to be applied before it could be made of any practical use, the article in this case having been imported for use in making watch dials, and having been in fact so used, was subject to a duty of 20 per cent ad valorem, under § 2513 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, as an article manufactured in whole or in part, not therein enumerated or provided for, and not to a duty of 25 per cent ad valorem, as "watch materials," not specially enumerated or provided for in the act, under Schedule N of § 2502 of the Revised Statutes, as enacted by the same § 6. *Worthington* v. *Robbins*, 337.
2. In order to be dutiable as "watch materials," the article, when imported, must be in such form of manufacture as to show its adaptation to the making of watches. *Ib.*
3. Under Schedule K of § 2502 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, 22 Stat. 509, women's and children's dress goods, composed of wool and cotton, valued at less than 20 cents per square yard, and weighing less than 4 ounces to the square yard, the cotton being carded in with the wool from which the yarn composing the warp was spun, there being 94 per cent of wool and 6 per cent of cotton, the cotton being put in to secure a lower classification for duty, and an ordinary examiner not being able to detect the cotton without a careful examination, and there being no threads or yarns

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made wholly of cotton or other material than wool, are dutiable at 5 cents per square yard and 35 per cent ad valorem, and not at 9 cents per square yard and 40 per cent ad valorem. *Seeberger* v. *Farwell*, 608.

4. The case of *Seeberger* v. *Farwell*, *ante*, p. 608, affirmed and applied to goods in which the percentage of cotton varied from 1.99 to 4.47. *Magone* v. *Luckemeyer*, 612.

5. Under the act of March 3, 1883, c. 121, § 6, bichromate of soda is subject to the duty of 25 per cent ad valorem, imposed by Schedule A upon "all chemical compounds and salts, by whatever name known;" and is not subject, by virtue of the similitude clause, to the duty of 3 cents per pound, imposed by that schedule on bichromate of potash. *Mason* v. *Robertson*, 624.

See LACHES, 4.

DEED.

A conveyance by deed of a perpetual right in land, for a solid consideration therein expressed, without any covenant for the payment of rent or the redelivery of possession, creates the relation of grantor and grantee between the parties. *Bybee* v. *Oregon & California Railroad Co.*, 663.

DEMURRER.

A demurrer admits facts well pleaded, but does not admit that the construction of a written instrument set forth in the bill is the true one, or that its legal effect is contrary to that which its language imports. *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 569.

DEPOSITION.

See EVIDENCE, 3.

ELECTION.

See LOCAL LAW, 9.

EQUITY.

1. In a suit brought against contractors for the construction of a railroad to hold them liable for the face value of stock received by them, in payment for work done, the bill alleged that they got $12,000 in the company's first mortgage bonds, for each mile of constructed road, and, in addition, $850,000 in its stock, and that the mortgage bonds received by them were full and adequate compensation for the work; but there was no allegation as to the real value of the stock. *Held*, that the bill was bad on demurrer; that it should have shown that the stock was of some value; and that the general allegations that the arrangement was a "fraud," a "breach of trust," a "scheme," and "colorable," without stating the ultimate facts upon which they were based, were only allegations of conclusions of law, which the demurrer to the bill did not admit. *Fogg* v. *Blair*, 118.

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2. M., a planter of Louisiana, died in 1860, leaving as his heirs, the minor children of his deceased daughter Julia, and the minor grandson of his deceased daughter Ann. At the death of his wife, in 1844, a large portion of the property then in his possession was community property, in which she was entitled to a half interest. Before his death he attempted, by sale and donation of specified estates, valued and appraised by him, to give to his daughter Julia (who was then living) her interest in the community property left by her mother and three-fourths of his own remaining estate; and, in a like way, to give to the grandson of his daughter Ann his like interest in the community property and the remaining one-fourth of his own estate. At his death he left a will with similar provisions. The parties each entered into possession of the properties thus respectively assigned to them, occupying in separate parcels, without interference from the testamentary executor. But in 1869 the testamentary executor of M. made a simulated sale of all the lands at the instance of one of the parties concerned. A creditor of his estate then filed a bill on behalf of himself and other creditors, to set aside this sale as fraudulent, and to subject the lands to the payment of the testator's debts; and such proceedings were had thereon that this court, at October term, 1883, decided that the sale was fraudulent in fact, and that the lands in the hands of the heirs were liable for his debts. *Johnson* v. *Waters*, 111 U. S. 640. The cause having been remanded to the Circuit Court for further proceedings and to afford other creditors an opportunity to become parties, the representatives of the heirs of Julia and of the heirs of Ann respectively presented their claims as creditors for their interest in the community property, and also filed bills in the nature of supplemental or cross-bills, setting up that they were not parties to the former decree, averring the validity of the sale declared fraudulent, setting up their claims to the community property, and claiming that they should be allowed for improvements. The creditors' representative answered, that the debts for the community property had been fully paid from rents and revenues, or, if not paid, had, under the laws of Louisiana, become subordinated to the debts of ordinary creditors. Further evidence was taken in addition to that in the original cause: *Held*,

(1) That the decision in *Johnson* v. *Waters*, was right as to the fraudulent character of the sale made in 1869, and that it be affirmed;

(2) That the act of sale and donation to M.'s daughter Julia, mentioned in *Johnson* v. *Waters*, was void as a donation, but valid as a sale to the extent of the consideration named therein; to wit, the debt due to her for her share in the community property, and the sum to be paid by her to the other heir;

(3) That any debt which may have been due from M. to either of his heirs on account of the community property, was more than satisfied by their respectively receiving that portion of the property which was

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intended by him to be a satisfaction of it, and by the rents and revenues received since his death; and that such portion in aliquot parts should be held by them free from the other debts of the estate; but that the remaining portion should be sold to pay said debts;

(4) That, being minors at the time they became heirs, they were, under the law of Louisiana, heirs with benefit of inventory, and not personally liable for the debts beyond the amount of the property which was not received in satisfaction of their own claim upon the community;

(5) That on equitable grounds they should have some allowance or consideration, beyond the use of the property, for improvements which they had placed upon it, and for restoration of its condition after floods and other devastations;

(6) That in view of the conflicting evidence and the difficulty of arriving at an accurate adjustment of equities this court would direct that the respective interests of the heirs be increased as indicated in the opinion;

(7) That there is nothing in the sections of the Civil Code of Louisiana, referred to in the opinion, which conflicts with these equitable conclusions. *Mellen* v. *Buckner*, 388.

3. When in a suit in equity this court finds, on examining the proofs, nothing which makes a proper case for equity, it is its duty to recognize the fact, and give it effect, though not raised by the pleadings, nor suggested by counsel. *Allen* v. *Pullman's Palace Car Co.*, 658.

See JURISDICTION, B, 4, 5;
LOCAL LAW, 1.

ESTOPPEL.

1. The grantee in a deed of conveyance is not estopped to deny the title of his grantor. *Bybee* v. *Oregon & California Railroad Co.*, 663.

2. The plaintiff in error, under the act of July 26, 1866, 14 Stat. 251, c. 262, constructed a ditch over lands granted to the defendant in error for a railroad under the act of July 25, 1866, 14 Stat. 239, c. 242. The defendant in error, under a misapprehension of its legal rights, received a deed from the plaintiff in error, conveying a license to enter upon said ditch and construct its road over the same, for the consideration of $250 paid by defendant in error to plaintiff in error, and upon condition against impairing or destroying said ditch. The plaintiff in error sued the defendant in error for so constructing its road as to permanently obstruct and destroy his ditch. *Held*, that the defendant in error by accepting the deed, was not estopped from denying the title of the plaintiff in error, or from asserting the invalidity of the covenant into which it had inadvertently entered. *Ib.*

EVIDENCE.

1. A judgment recovered against an administrator in one State is no evidence of debt in a suit by the same plaintiff in another State against

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third persons having assets of the deceased. *Johnson* v. *Powers*, 156.

2. The allowance, by commissioners appointed by a probate court in the State of Michigan, pursuant to statute, of a claim against the estate of a deceased person, upon a hearing to which the only party is the administrator in his personal capacity as claimant, and in his representative capacity as defendant, is no evidence of debt in a suit in equity by him in the Circuit Court of the United States in New York to recover from other persons assets of the deceased. *Ib.*

3. The failure to note an objection to a deposition, based upon the form of the commission or the manner of executing it, when the deposition is taken, or to present the objection by a motion to suppress, or by some other notice before the trial begins, will be held to be a waiver of it. *Howard* v. *Stillwell & Bierce Mf'g Co.*, 199.

See JURISDICTION, C, 1;
NEGLIGENCE, 5;
WITNESS.

EXECUTION.

See LOCAL LAW, 2, 3.

EXECUTOR AND ADMINISTRATOR.

An administrator appointed in one State cannot as such maintain any suit in another State. *Johnson* v. *Powers*, 156.

See EVIDENCE, 1, 2;
WITNESS.

FISHERIES.

1. The act of the legislature of Massachusetts, approved May 6, 1886, (Laws of 1886, c. 192,) "for the protection of the fisheries in Buzzard's Bay," is valid, so far as it relates to the taking of menhaden. *Manchester* v. *Massachusetts*, 240.

2. It applies to a vessel which has a license to fish for menhaden under the laws of the United States. *Ib.*

3. As between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from the coast; and bays wholly within its territory which do not exceed two marine leagues in width at the mouth are within this limit; and included in such territorial jurisdiction is the right of control over fisheries. *Ib.*

4. The courts of Massachusetts can lawfully take jurisdiction of violations of such statutes, as against the admiralty and maritime jurisdiction of the courts of the United States. *Ib.*

5. It has always been the doctrine of this court, that whenever a conflict arises between a State and the United States, as to the regulation of

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commerce or navigation, the authority of the latter is supreme and controlling. *Ib.*

6. Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test Massachusetts can include Buzzard's Bay within the limits of its counties. *Ib.*
7. There are no existing treaties or acts of Congress which relate to the menhaden fisheries within such a bay as Buzzard's Bay. *Ib.*
8. The question is not considered whether or not Congress would have the right to control the menhaden fisheries in question. *Ib.*

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

HABEAS CORPUS.

When the trial court of a State has jurisdiction and power, under state laws, to determine the law applicable to the case of an indictment and trial for murder, and the prisoner, when convicted, has an appeal to an appellate court of the State, of which he avails himself, the Circuit Court of the United States for the District, if applied to for a writ of *habeas corpus*, pending the appeal, upon the ground that the proceedings are in violation of provisions of the Constitution of the United States, may properly decline to interfere. *In re Duncan*, 449.

INSURANCE.

1. In the State of Arkansas, foreign insurance companies are governed by the statute of March 26, 1887, requiring such companies to file with the auditor of State stipulations for the service of process upon them, and not by the statute of April 4, 1887, which requires foreign corporations to file such stipulations with the Secretary of State. *St. Louis, Iron Mountain &c. Railway* v. *Commercial Union Ins. Co.*, 223.
2. The right of an insurer, upon paying for a total loss of the goods insured, to recover over against a third person responsible for the loss, is derived by way of subrogation from the assured, and can be enforced in his right only. *Ib.*
3. A railroad corporation, which has contracted with a compress company to receive and transport all cotton brought by its owners to the warehouse of that company, and neglects to do so, by reason of which, and of the consequent accumulation of cotton at the warehouse, so large a mass of cotton is piled and kept by the compress company in the adjoining street, as from the danger of taking fire to become a public nuisance, and is there destroyed by fire from an unknown cause, is not responsible for the loss to owners of part of such cotton for which it has given no bills of lading, if it has in fact assumed no custody or control of any of the cotton, or of the place where it was kept, before it was put upon the cars; although it has, as a matter of

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convenience, given to the owners of other parts of such cotton bills of lading in exchange for the warehouse receipts of the compress company; and although it is prohibited by statute, under a penalty, from issuing bills of lading, except for goods actually received into its possession. *Ib.*

4. The plaintiff in error was an association formed "to furnish substantial aid to their families or assigns in the event of a member's death." The husband of the defendant in error became a member, and received a certificate stating that in consideration, among other things, "of the payment of all dues and of all mortuary assessments" his wife should be entitled to receive $10,000 from the death fund of the association. The constitution and by-laws of the association provided that a mortuary assessment should be made on the first days of February, May, August and November, but did not fix any rate; that it should be the duty of a member failing to receive notice of an assessment on or before those days, to notify the home office thereof; and that a failure to pay the assessment within thirty days from said first days should work a forfeiture of membership. When the husband died he had failed for more than thirty days to pay an assessment which had been made, and had not informed the association that he had failed to receive notice of it. To an action brought by the beneficiary to recover the amount insured the association set up these failures in defence. *Held*, (1) That the association was not required to make assessments except when made necessary in order to meet existing claims; (2) That the insured was entitled to notice of each assessment; (3) That the failure of the assured to inform the association of a failure to receive notice of an assessment did not work a forfeiture of membership and of previous payments; (4) That, as there was conflicting evidence upon the issue of fact whether notice of the assessment was mailed by the association to the assured, it was properly left to the determination of the jury. *Mutual Reserve Fund Life Assn.* v. *Hamlin*, 297.

See CONTRACT, 2.

JUDICIAL SALE.

See LOCAL LAW, 7.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. A statute of a State, which authorizes the judge presiding at the trial to order a judgment of nonsuit to be entered, when in his opinion the evidence introduced by the plaintiff is insufficient in matter of law to sustain a verdict, may be followed, under Rev. Stat. § 914, in the Circuit Court of the United States held within that State; and a judgment of nonsuit rendered accordingly, upon a ruling in matter of law

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duly excepted to, may be reviewed by this court on writ of error. *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 24.

2. When the highest court of a State dismisses a case upon the ground that the matters involved were purely pecuniary, and that the amount in controversy was less than sufficient to give the court jurisdiction under the constitution of the State, no federal question arises. *Callan* v. *Bransford*, 197.

3. There being no exceptions to the rulings of the court in the progress of the trial, and the findings of fact by the court being general, the record raises no question open to revision. *British Queen Mining Co.* v. *Baker Silver Mining Co.*, 222.

4. *Buck* v. *Colbath*, 3 Wall. 334, affirmed on the point that a suit prosecuted in the state courts to the highest court of such State against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper federal court, presents a case for a writ of error to this court, when the final decision of that court is against the validity of the authority thus set up by the marshal. *Etheridge* v. *Sperry*, 266.

5. In determining the ground upon which a judgment in a state court was rendered, this court may refer to the opinion of that court. *W. A. Wood Machine Co.* v. *Skinner*, 293.

6. When it does not appear upon what ground the highest court of a State placed its judgment, and the judgment may be supported without deciding a federal question, this court is without jurisdiction of it in error. *Ib.*

7. On a libel *in rem*, against two canal boats, brought by two insurance companies, alleging that they had insured a cargo of wheat on board of one of the boats, which was lost through the carelessness of those in charge of the two boats, and that they had paid $9211.75 to the insured, who owned the wheat, as its value, and received an abandonment of the cargo, and were subrogated to the rights of the insured, the District Court dismissed the libel, and, on appeal, the Circuit Court reversed the decree and awarded to the libellants a decree for $8252.47, condemning both of the boats therefor. In the District Court one of the boats was sold for $2100 and the proceeds were paid into court, and a stipulation for value as to the other boat, in $1000, was given by consent. The claimant, who owned both of the boats at the time of the loss, appealed to this court; *Held*, that this court had no jurisdiction of the appeal, because all that was involved was the $2100 and $1000, and the aggregate of those sums did not exceed $5000; and there was no decree *in personam* against the claimant. *The Sydney*, 331.

8. A decree was entered in the Circuit Court in favor of two complainants against a defendant for the infringement of letters patent, from which the defendant appealed. After the decree, and before the appeal was taken, one of the complainants below died. It did not appear that the

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cause of action survived, or that there was a severance between the surviving and the representatives of the deceased plaintiff. The death of the deceased party was not suggested on the record, his representatives did not appear voluntarily, nor were they cited to appear. *Held*, that the proper course of proceeding to enable this court to obtain jurisdiction had been wholly disregarded, and that it was too late to cure the defect, more than four years having elapsed since the final decree was entered. *Dolan* v. *Jennings*, 385.

9. To give this court jurisdiction to review the judgment of a state court under section 709 of the Revised Statutes, because of the denial by the state court of any right, title, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way. *Leeper* v. *Texas*, 462.

10. A decree dismissing the bill was entered April 21, 1883. Judgment for costs was rendered June 16, 1883. The appeal was allowed June 16, 1885, on an application made June 15, 1885. *Held*, that the decree of April 21 was the final decree; but that, even if the judgment of June 16 was the final decree, the allowance was too late to enable this court to take jurisdiction. *Fowler* v. *Hamill*, 549.

11. On a writ of error, this court cannot review any error committed by a jury in finding an amount of damages; nor take cognizance of a complaint that a motion for a new trial was overruled, or that the verdict of the jury was contrary to law and not warranted by the testimony. *Wilson* v. *Everett*, 616.

12. A writ of error to review the judgment of the highest tribunal of a State cannot be maintained in the absence of a Federal question giving this court jurisdiction. *Davis* v. *Texas*, 651.

13. The questions sought to be presented in this case as Federal questions fall entirely within the scope of the exercise of the powers of the State, and this court has no jurisdiction over them. *Ib.*

See CORPORATION, 2;
NATIONAL BANK, 1.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

1. The doctrine reaffirmed that the federal courts, sitting in any State, have equal and coördinate jurisdiction with the state court in determining questions of general law, although they will, in cases of doubt, lean to an agreement of views with the state court. *Clark* v. *Bever*, 96.

2. The judgment in this case was reversed in this court for want of jurisdiction in the Circuit Court, 130 U. S. 341. The reversal was accompanied by an order that the defendants recover their costs in this court, and have execution therefor, and the cause was remanded to

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the Circuit Court for further proceedings. Upon filing the mandate in the Circuit Court, the defendants moved that they have judgment against the plaintiff for their costs in this court, and for the costs of the transcript from the Circuit Court, and that execution issue therefor. The defendants, alleging in their motion that certain sums had been collected on the judgment, also moved for a summary inquiry as to the amount, and that they have judgment for the same, with interest; and they having proved that there was collected by the plaintiff upon the judgment, by supplementary proceedings in aid of the execution thereon, the sum of $629.23, the court rendered judgment that the defendants recover that sum with interest and costs, and that the action be dismissed for want of jurisdiction as to the subject matter of the suit. *Held*, that the Circuit Court had jurisdiction to correct by its own order that which, according to the judgment of this court, it had no authority to do in the first instance, and that the judgment should be affirmed. *Northwestern Fuel Co.* v. *Brock*, 216.

3. In this case the complaint described the defendant as a corporation chartered under the laws of Alabama and doing business in that State, one of the plaintiffs as a "resident" in North Carolina, and two other plaintiffs as "residents" in South Carolina. An amendment added twelve plaintiffs with no averments as to citizenship. As the jurisdiction depended upon citizenship; *Held*, that the Circuit Court was without jurisdiction. *Timmons* v. *Elyton Land Co.*, 378.
4. While an unconstitutional tax may confer no right, impose no duty and support no obligation, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction, where irreparable injury or other ground for equitable interposition is not shown to exist. *Shelton* v. *Platt*, 591.
5. Purely injunction bills cannot be maintained to restrain the collection of taxes upon the sole ground of their unconstitutionality. *Shelton* v. *Platt*, 139 U. S. 591, affirmed and applied. *Allen* v. *Pullman's Palace Car Co.*, 658.

C. Jurisdiction of the Court of Claims.

1. In an action against the United States to recover for amounts due certain mail contractors under the appropriation in the sundry civil appropriation act of March 3, 1877, 19 Stat. 362, c. 105, which provided that "any such claims which have been paid by the Confederate States government shall not again be paid;" the burden of proof is on the plaintiff to show that his claim was not of the excepted class. *Selma, Rome &c. Railroad Co.* v. *United States*, 560.
2. Whether, that appropriation having been covered into the Treasury, a claimant can maintain suit under that act in the Court of Claims without further legislation, is a question which the court has not deemed it necessary to consider. *Ib.*

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LACHES.

1. Forty-three years after the ancestor of the plaintiffs acquired title, more than twenty years after that ancestor had positive information of the wrong upon which the claims set up in this bill of equity are grounded, twenty-five years after the purchase by the defendant in good faith and with no knowledge of the wrong, this suit was commenced, without any assertion of the right now set up having been made during all that time. *Held*, that these facts disclosed laches which forbade the interference of a court of equity. *Underwood* v. *Dugan*, 380.

2. The statute of limitations of Nebraska, of four years, as to an action for relief on the ground of fraud, and the doctrine of laches, apply to a suit by a county in Nebraska, brought in the Circuit Court of the United States for the District of Nebraska, to set aside a decree of the same court for fraud. *Boone County* v. *Burlington & Missouri River Railroad Co.*, 684.

3. Facts stated which supported the defences of the statute of limitations and of laches. *Ib.*

4. On the 16th of November, 1863, plaintiffs brought suit to recover customs duties illegally exacted, laying the *ad damnum* at $1500. On the 8th of January, 1881, they amended their claim, increasing the *ad damnum* to $20,000. There was no interest count in the declaration, and it was doubtful whether interest was at first specially declared for in any way. No account was rendered or demand made prior to the commencement of the suit, nor was any bill of particulars furnished at that time. On the 11th of May, 1882, a bill of particulars was for the first time served. The court below gave judgment for $14,394.95, with interest from the date of the several payments. *Held*, on the facts set forth at length in the opinion, showing laches on the part of plaintiffs, that they were only entitled to judgment for $1500 with interest from November 16, 1863, and $12,894.95, with interest from January 8, 1881. *Redfield* v. *Bartels*, 694.

LIMITATION, STATUTES OF.

See LACHES, 2, 3.

LOCAL LAW.

1. An averment in a bill, filed by the curator of an interdict in Louisiana to have a contract declared null and void, that at the time of making it the interdict was losing, and to a great extent had lost, his capacity to attend to business and to manage his affairs, and that his mind was seriously impaired so as to affect his understanding and judgment, and so continued until he was judicially interdicted, does not meet the requirements of the Civil Code of that State, and does not entitle the plaintiff to relief upon the ground that the interdict was then incapable in law of making a binding agreement. *Stockmeyer* v. *Tobin*, 176.

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2. In Louisiana a judgment debtor can waive or renounce the right to have property, which is taken on execution to satisfy the judgment, appraised. *Ib.*

3. The right of appraisement of property taken on execution is given in Louisiana to the owner, and, if waived by him, his creditors cannot complain unless the waiver was made fraudulently and to defeat their debts. *Ib.*

4. When a mortgage in Louisiana stipulates for a sale, on forfeiture, without appraisement, and the petition for executory process prays for such a sale, and the order is "let executory process issue herein as prayed for and according to law," it imports a sale without appraisement. *Ib.*

5. When a plantation in Louisiana and its fixtures are to be sold under a mortgage, the sale must be made at the seat of justice, unless the debtor, within the time after the seizure prescribed by law, requires it to be made on the plantation. *Ib.*

6. In Louisiana, when a plantation and the personal property upon it are mortgaged together by one mortgage, they may be sold together as an entirety. *Ib.*

7. In Louisiana mere informalities or irregularities in a judicial sale do not constitute a sufficient ground for setting it aside. *Ib.*

8. Following the Supreme Court of Iowa in its construction of the local law of that State, this court holds that a mortgage of a stock of goods in a store in that State, otherwise valid, is not invalidated by reason of a parol understanding at the time of its execution, that the mortgagor may retain possession, and sell the goods, and apply the proceeds to his own support, and to keep up the stock, applying only the surplus to the payment of the mortgage debt. *Etheridge* v. *Sperry*, 266.

9. Sections 1067, 1068 and 1070 of the Code of Tennessee of 1884, by Milliken & Vertrees, do not require that, after an election, the ballot-box shall be opened at the place where the election was held, and the names of the persons appearing in each ballot be read aloud at that place, and the ballot-box not be removed from that place before the votes are counted, so as to make an indictment good, under § 5515 of the Revised Statutes of the United States, relating to an election at which a Representative or Delegate in Congress is voted for, which alleges, as a neglect or refusal to perform a duty, required of the officer of an election, by a law of a State, and as a violation of a duty imposed by such law, a failure to open the ballot-box at that place, and a failure to read aloud such names at that place, and the removing of the ballot-box from that place before the votes were counted, no fraud being averred in the indictment, and no intent to affect the election or its result, and there being no allegation that the election or its result was affected. *United States* v. *Brewer*, 278.

See CHATTEL MORTGAGE.

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Arkansas. *See* INSURANCE, 1.
Iowa. *See* ASSIGNMENT FOR BENEFIT OF CREDITORS, 2.
Kansas. *See* TAX SALE.
Kentucky. *See* CORPORATION, 10, 11.
Louisiana. *See* EQUITY, 2; NEW ORLEANS DRAINAGE IMPROVEMENTS.
Massachusetts. *See* FISHERIES.
Nebraska. *See* LACHES, 2, 3.

MANDAMUS.

1. The writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty, involving the exercise of judgment or discretion. *Boynton* v. *Blaine*, 306.
2. When a mere ministerial duty is imposed upon the executive officers of the government, that is, a service which they are bound to perform without further question, then, if they refuse, the mandamus may be issued to compel them. *Ib.*
3. A writ of mandamus confers no new authority, and the party to be coerced must have the power to perform the act. *Ib.*
4. The act of June 18, 1878, 20 Stat. 124, c. 262, subjects specifically the payment of the Weil and La Abra awards under the Mexican Claims Commission of July 4, 1868, 15 Stat. 679, to the control of the President; and the subject being thus confided to his judgment and discretion, mandamus will not lie to compel their payment. *Ib.*

MEXICAN CLAIMS COMMISSION.

See MANDAMUS, 4.

MEXICAN LAND GRANTS.

See PUBLIC LAND, 16, 17.

MINERAL LAND.

See PUBLIC LAND, 12, 13, 14, 15.

MORTGAGE.

1. Limitations upon the power of a trustee in a railroad mortgage to take proceedings to enforce payment of the amount secured should be construed strictly. *Guaranty Trust &c. Co.* v. *Green Cove Spring &c. Railroad Co.*, 137.
2. A provision in a mortgage that the mode of sale provided by it "shall be exclusive of all others" is an attempt to provide against a remedy in the ordinary course of judicial proceedings and oust the jurisdiction of the courts, and is therefore invalid. *Ib.*

See LOCAL LAW, 4, 5, 6, 7.

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MOTION TO DISMISS.

1. When the court cannot pass upon a motion to dismiss without referring to the transcripts on file, it will deny the motion without prejudice. *Callan* v. *Bransford*, 197.

2. When the pleadings in the trial court of a State, the assignment of error in the Supreme Court of the State, the opinion of the latter court and its original decree present no federal question, and two days later on motion of counsel the decree is modified so as to show that a federal question was presented by counsel and decided adversely to their contention, there is color for a motion to dismiss for want of jurisdiction here. *East Tennessee, Virginia &c. Railway Co.* v. *Frazier*, 288.

MUNICIPAL CORPORATION.

1. A municipality which abandons a contemplated work of public improvement, assumes thereby no obligation to parties who have invested on the faith and expectation of benefit from the completion of the work. *Peake* v. *New Orleans*, 342.

2. When a contract for local improvements in a municipality is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong upon the part of the corporation, neither justice nor equity will tolerate that it be charged as debtor therefor. *Ib.*

See NEW ORLEANS DRAINAGE IMPROVEMENTS.

NATIONAL BANK.

1. T. sold to a national bank, for sixty-eight cents on the dollar, $12,800 of the bonds of a municipal corporation issued in aid of a railroad under an agreement that the bank would, upon demand, replace them to him at the same or a less price. Subsequently, he demanded compliance with this agreement, but the bank refused. In an action brought against the bank in a state court to recover the difference between the amount it paid for the bonds, and their value at the time they were demanded, the defence in part was that the bank had no authority, under its charter and the national banking act, to make the alleged agreement and purchase, and, by reason of such want of authority, could not be held liable to the plaintiff in any amount or upon any ground whatever. This defence was overruled in the state courts of original and appellate jurisdiction. *Held*, (1) That this court had jurisdiction to review the judgment, so far as it involved the question whether the bank was exempted by the act of Congress or by its charter, from liability to account to the plaintiff for the value of the bonds which the jury found were purchased by it from the plaintiff, to be returned to him on demand at the same or a less price; (2) The national banking act is an enabling act for associations organized under it, and one cannot rightfully exercise any

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powers except those expressly granted, or such incidental powers as are necessary to carry on the business for which it was established; (3) But that act does not give a national bank an absolute right to retain bonds coming into its possession, by purchase, under a contract which it was without legal authority to make. Although the bank is not bound to surrender possession of them until reimbursed the full amount due to it, and may hold them as security for the return of the consideration paid, yet when such amount is returned, or tendered back to it and the return of the bonds demanded, its authority to retain them no longer exists; and, from the time of such demand and its refusal to surrender the bonds to the vendor or owner, it becomes liable for their value upon grounds of implied contract, apart from the original agreement under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. *Logan County National Bank* v. *Townsend*, 67.

2. The Territories possess the same power of taxing national banks which States enjoy. *Talbott* v. *Silver Bow County*, 438.
3. Section 1003 of chapter 53 of the fifth division of the Revised Statutes of Montana Territory, as amended by the act of February 22, 1881, Laws of 1881, p. 67, is not in conflict with Rev. Stat. § 5219. *Ib.*
4. Under the general territorial system, as expressed in the various organic acts, the power of taxation is absolute, save as restricted by the Constitution or congressional enactments. *Ib.*

NEGLIGENCE.

1. The severing of a train of cars in motion on a railroad in the night time, leaving a part, uncontrolled except by ordinary brakes, to run across a public highway at grade, without warning by either flagman, bell, whistle or in some other effective way, that they were approaching, is a disregard of the rights of persons using the highway, and it justified the court in saying, as matter of law, that it constituted negligence on the part of the railroad company, for which the plaintiff could recover unless he had been guilty of contributory negligence. *Delaware, Lackawanna &c. Railroad Co.* v. *Converse*, 469.
2. The instructions of the court properly submitted to the jury the question whether the plaintiff was guilty of contributory negligence; and, the jury having passed upon that issue, this court cannot review their finding. *Ib.*
3. The rulings of the court admitting or refusing to admit evidence on sundry points were no error, having rightly held the defendant guilty of negligence, leaving the jury to determine whether the plaintiff was guilty of contributory negligence. *Ib.*
4. In an action by a wharfinger against a steamboat company for crushing his foot between the timbers of a wharf by the violent striking of a

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steamboat against the wharf, while touching there to receive freight from him, in calm weather, there was conflicting testimony from the plaintiff and from those on board the steamboat as to the negligence of either party, including evidence that the plaintiff, immediately after the injury, and again the next morning, admitted that he was hurt by his own fault. *Held*, that the defendant had no ground of exception to the following instructions: (1) That the shock and pain might render the plaintiff incapable of telling exactly how the thing took place, and that his making different statements at different times did not necessarily imply an intention to mislead, and therefore the jury might look at any difference in his statements in that point of view. (2) That it would be *prima facie* evidence of the defendant's negligence, if the steamboat was thrown with such force against a wharf properly built as to tear up some of the planks; or if it was dangerous to make a stern landing, with neither captain nor pilot in the pilot-house, and under the other circumstances proved. (3) That any negligence of the plaintiff, directly contributing to the injury, would incapacitate him from recovering; and that if he negligently placed his foot between timbers of the wharf, and allowed it to remain there while the steamboat was departing, and it was injured while so placed, it was for the jury to decide whether there was such negligence as would disentitle him from recovering. (4) That the burden of proof was on the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury. (5) That contributory negligence of the plaintiff would not prevent him from recovering, if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. *Inland & Seaboard Coasting Co.* v. *Tolson*, 551.

5. Whether a particular position on a wharf is a safe place for the wharf-inger to stand, while a steamboat is approaching to take off freight or to make a landing, is a question for the jury, and not for opinions of witnesses. *Ib.*

NEW ORLEANS DRAINAGE IMPROVEMENTS.

1. The judgment at law on which the bill in this case is based, absolved the defendant from any primary obligation of debtor to creditor, and left it chargeable only as trustee of a fund out of which plaintiff's claim was to be paid; and it was unquestionably correct. *Peake* v. *New Orleans*, 342.

2. To the extent that the city of New Orleans may be considered as such a trustee, it is a compulsory trustee by force of the legislation of 1871, and not a voluntary and contractual trustee, and its responsibility should be restricted to the narrowest limits. *Ib.*

3. In failing to collect the uncollected assessments, the city was guilty of no dereliction of duty as trustee. *Ib.*

4. The various assessment proceedings, taken in connection with the decis-

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ion of the Supreme Court approving the homologation of the tableaux, may have operated, if not to cast a specific lien upon the streets and other public grounds, at least to charge upon the city an obligation to the drainage fund for a proportionate share of the total cost of the drainage; but the city has, by its issues of city bonds in exchange for warrants, paid an amount on account of drainage far in excess of all the assessments charged against it, and nothing is due from it as trustee on this account. *Ib.*

5. By the purchase of the property of the canal company under the act of February 4, 1876, the city did not assume the duty of completing the contemplated work, and did not incur any responsibility for injuries resulting from its non-completion. *Ib.*

NORTHERN PACIFIC RAILROAD.

See PUBLIC LAND, 1 to 11.

PATENT FOR INVENTION.

1. In view of the previous state of the art, the first claim in letters patent No. 279,871, issued June 19, 1883, to Charles Hoff of Cincinnati, for an improvement in coal-hods, must be limited to the entire bottom of the crimped material and the resultant increase in its thickness; and, being so limited, it is not infringed by a coal-hod made after letters patent No. 304,033, granted August 26, 1884, to Henry S. Reynolds. *Hoff* v. *Iron Clad Manufacturing Co.*, 326.
2. Whether both patents were not void for want of novelty, *quære*. *Ib.*
3. Claims 2, 4 and 5 of reissued letters patent No. 9743, granted June 7, 1881, to the Franklin Electric Gas-Lighting Company, as assignee of Jacob P. Tirrell, the inventor, for improvements in electrical apparatus for lighting street lamps, etc., (the original letters patent, No. 130,770, having been granted to said Tirrell, August 20, 1872, and the application for the reissue having been filed February 21, 1881,) are invalid, as against the defendant's apparatus, constructed under letters patent No. 281,345, granted July 17, 1883, to the Boston Electric Company, as assignee of Charles H. Crockett, the inventor, on an application filed April 11, 1883, for improvements in electric gas-lighters. *Electric Gas Lighting Co.* v. *Boston Electric Co.*, 481.
4. The original patent and the reissue compared, as to the specification and the claims. *Ib.*
5. The state of the art at the date of the invention described in No. 130,770, set forth. *Ib.*
6. The history of the application for the reissue, given. *Ib.*
7. The delay of 8½ years in applying for the reissue is not explained; there was no inadvertence, accident or mistake; and the sole object of the reissue was to unlawfully expand the claims. *Ib.*
8. The first claim under letters patent No. 173,284, dated February 8, 1876, granted to Charles H. Helms for an improvement in sole-edge burnish-

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ing machines, namely, "in combination with the burnishing tool, and the rest for the face of the sole, the finger-rest D, substantially as described" falls within the many rulings of this court, holding that a mere aggregation of old elements in a new relation is not the subject of a patent. *Union Edge Setter Co.* v. *Keith*, 530.

9. A telegraph sounder constructed under letters patent No. 352,317, granted November 9, 1886, to Charles D. Haskins, infringes the third claim of letters patent No. 270,767 for a new and useful improvement in telegraph keys, viz., "The combination, in a telegraph key, of the lever fulcrumed upon the torsional spring, with the adjusting screws H H′, for regulating the amplitude of the lever movement and the retractile resistance of the torsion-spring, substantially as described." *Western Electric Co.* v. *La Rue*, 601.

10. While the promotion of an old device, such, for instance, as a torsional spring, to a new sphere of action, in which it performs a new function, involves invention, the transfer or adaptation of the same device to a *similar* sphere of action, where it performs substantially the same function, does not involve invention. *Ib.*

PLEADING.

See DEMURRER.

PRACTICE.

1. When, in the trial of a cause, an objection is taken that the legislature failed to comply with the provisions of the Constitution in the enactment of a statute, it should be so presented that the adverse party may have opportunity to controvert the allegations, and to prove by the record due conformity with the constitutional requirements. *In re Duncan*, 449.

2. Instructions to a jury upheld, where they could not have prejudiced the party complaining. *Wilson* v. *Everett*, 616.

3. As the writ of error was sued out merely for delay, this court awarded 10 per cent damages on the amount of the judgment, in addition to interest. *Ib.*

See ABSENT DEFENDANT, 1, 2; CERTIFICATE OF DIVISION OF OPINION; JURISDICTION, A, 1, 5, 6; MOTION TO DISMISS; WRIT OF ERROR, 1, 2.

PUBLIC LAND.

1. The grant of public land to the Northern Pacific Railroad Company in the act of July 2, 1864, 13 Stat. c. 217, p. 365, was a grant *in præsenti*, in the nature of a float until the route should be determined, and, after that, attaching to specific sections, capable of identification, except as to sections which were specifically reserved. *St. Paul & Pacific Railroad Co.* v. *Northern Pacific Railroad Co.*, 1.

2. The force of such grant was in no respect impaired, or its construction

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affected, by the provision in section four of that act that patents for the land should be issued as sections of twenty-five miles of the road should be completed; but the company was not at liberty to dispose of its land not patented, without the consent of Congress. *Ib.*

3. When the termini of a railroad for whose construction a land grant is made are mentioned, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. *Ib.*

4. The line of the Northern Pacific Railroad through the State of Minnesota having been definitely determined in accordance with law, and the road having been constructed, the company's right to the lands in place along the line of its route as so located, and to other lands to make up deficiencies, cannot be doubted, unless a prior right attached to those lands under an earlier grant from Congress. *Ib.*

5. The several acts granting public lands in aid of the construction of the St. Paul and Pacific Railroad being examined and analyzed, it appears that the grants to that company, so far as they form the subject of controversy, were subsequent in date to the act under which the Northern Pacific Railroad Company claims, and come under the well settled rule that, where different grants cover the same premises, the elder takes the title. *Ib.*

6. The operation of the act of March 3, 1857, 11 Stat. c. 99, p. 195, upon lands previously reserved, was restrained by the act of March 3, 1865, 13 Stat. c. 105, p. 526. *Ib.*

7. The act of March 3, 1871, 16 Stat. c. 144, p. 588, does not purport to be an amendment of the act of March 3, 1857, but only authorizes a change in the lines of the company, in consideration of the relinquishment of certain lands. *Ib.*

8. The exception, in the grant to the Northern Pacific Railroad Company, of all subsequent grants prior to the definite location of its road, was not intended to cover other grants for the construction of roads of a similar character. *Ib.*

9. After the withdrawal from sale or preëmption of the granted odd sections, no interest in the granted lands, adverse to the rights of the company, could be acquired except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route was fixed. *Ib.*

10. In order to secure the grant in the finished sections it was not necessary that the road, throughout its whole length, should be fixed; but the general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. *Ib.*

11. There was in this case no occasion for the exercise of the judgment of the Secretary of the Interior in selecting indemnity lands, as all the lands within the indemnity limits only made up in part for the deficiency. *Ib.*

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12. The provisions of the public town-site laws prohibiting acquisition of title thereunder to mines of the precious metals, and protecting therefrom possessory claims under the mining laws, must be construed in accord with the uniform exception in Federal legislation of mineral lands from grant or sale, and held merely to prohibit passage of title thereunder to mines of gold, silver, cinnabar or copper which are known to exist on the issue of the town-site patent, and to mining claims and possessions then lawfully existing. Such exceptions include only those lands which at the date of the grant are of known sufficient mineral value and extent to justify expenditures for the extraction of the mineral. *Davis* v. *Weibbold*, 507.

13. Town-site patent of earlier date covering same premises embraced in junior mining patent carries the title in absence of proof establishing the known existence of the mine at date of such town-site patent. The claimant under the town-site patent may offer evidence to prove that the premises were not known to be valuable for minerals at date thereof to rebut the presumption *contra* indulged, without proof, solely from the fact of issue of such mineral patent. *Ib.*

14. Exception from the mineral patent of town-site occupancy and improvements, within recited limitations, is unimportant. A mineral patent carries with it all rights which the law confers, and officers of the land department cannot enlarge or diminish those rights by any reservation beyond or differing from those contained in the law. *Ib.*

15. The mining laws provide for exploration and purchase of the mineral lands of the United States, and where prior to town-site patent proceedings thereunder to acquire title are initiated, the same may be prosecuted to completion afterwards. But in absence thereof, on issue of town-site patent and conveyance to individuals thereunder, the premises become private property, and jurisdiction to grant patents of them under the mining laws no longer exists. While the patent of the government is exempt from collateral attack in actions at law, such exemption obtains only where jurisdiction of the Land Department over the land, and power to determine the facts necessary to such issue, exist. *Ib.*

16. Questions affecting the validity of the Maxwell land grant, as to the authority of the Mexican government to make it, are no longer open; and a party claiming the same land under a prior grant from the Mexican government must, to succeed in his claim, recover on the strength of his own title. *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 569.

17. An *empresario* grant of land in Mexico operated to designate a tract of country within which the *empresarios* might establish a colony or colonies; but no title to any land passed to them until such colony was established. *Ib.*

18. In May, 1871, one S settled upon unsurveyed public lands in Oregon, as an intending preëmptor. In September following, he induced his

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brother to remove from California and make like settlement on adjoining unsurveyed lands and assisted him in building and making other improvements thereon. After official survey and filing of plat thereof in the local land office, each filed preëmption declaration for the land severally occupied by them. Shortly thereafter, and upon *ex parte* affidavits falsely averring his own residence and occupation thereon, S was granted permission by the Commissioner of the General Land Office to change his preëmption declaration so as to include the land claimed and occupied by his brother, who, as shown by the findings, was a qualified preëmptor, in actual occupation, with substantial improvements. After issue of patent to S for the land embraced in his amended declaration, he brought ejectment against his brother for possession. The latter thereupon invoked the aid of a court of equity to enjoin S from prosecuting his action of ejectment; to declare the latter trustee of the property, and to compel transfer thereof to him. In such action, *Held*, (1) That while the determination of the land department in a matter cognizable by it in the alienation of lands under the laws of the United States cannot be collaterally impeached, when its enforcement is sought, — where the matter determined is not properly before the department, or its conclusion has been reached from misconstruction of the law applicable to the case, and it has thus denied to a party, rights which upon a correct construction would have been conceded to him, or where misrepresentation and fraud have been practised necessarily affecting its judgment, a court of equity in a proper proceeding will interfere and control its determination so as to secure the just rights of the party injuriously affected. The party acquiring the property under the circumstances mentioned, will be charged as a trustee of the rightful owner, and be compelled to transfer the property to him. (2) By section 2261 of the Revised Statutes, and in consonance with the established practice of the land department thereunder, but one preëmption declaration is permitted. The statutory prohibition against a second declaration is unqualified, and applies in all cases, except where a prior claim has prevented the completion of the original entry, or a mistake in the original declaration has occurred without the knowledge or any fault of the claimant. (3) The tract applied for in the second declaration need not be an entirely separate and distinct parcel to call into effect the prohibition; it is enough if there be such addition to the original land applied for as to justify the designation of it with the addition as a different tract. (4) The Commissioner of the General Land Office having no authority to allow an amendment by a preëmptioner of his original declaration so as to cover a different tract, the land department acquires by such amendment no jurisdiction to award the additional tract to the claimant. Its action upon such additional tract will not defeat the rights of the occupant thereof. *Sanford* v. *Sanford*, 642.

19. The grant of "lands to aid in the construction of a railroad and tele-

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graph line from the Central Pacific Railroad, in California, to Portland, in Oregon," made by the act of July 25, 1866, 14 Stat. 239, c. 242, was a grant *in præsenti;* and the provision in section 8 of that act, that in case the companies should fail to complete the road on or before July 1, 1875, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States, is a condition subsequent, of which only the United States can take advantage. *Bybee* v. *Oregon & California Railroad Co.*, 663.

20. Under the act of July 26, 1866, 14 Stat. 251, c. 262, "granting the right of way to ditch and canal owners over the public lands," no right could be acquired to any portion of the public lands until the actual taking possession of the same for the purpose of constructing a ditch. *Ib.*

RAILROAD.

1. A railroad company, holding itself out as a carrier of live stock, is under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock that may be offered for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. *Covington Stock Yards Co.* v. *Keith*, 128.
2. The duty to receive such stock cannot be efficiently discharged, at least in a town or city, without the aid of enclosed yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public, while being loaded upon the cars in which they are to be transported. And the duty of the carrier to deliver cannot be safely and effectively performed except in and through enclosed yards or lots convenient to the place of unloading. *Ib.*
3. A carrier of live stock must be at all times in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. It cannot, in addition to the customary and legitimate charges for transportation, make, or allow any agent it employs to make a special charge for merely receiving or merely delivering such stock in and through yards provided for that purpose. *Ib.*
4. In respect to the mere loading and unloading of the stock at a particular city, the carrier is required by the nature of its employment to furnish such suitable and convenient appliances as are reasonably sufficient for the business at that place. *Ib.*

See CONTRACT, 2;
CORPORATION, 2, 6;
EQUITY, 1;
INSURANCE, 3;
MORTGAGE, 1, 2;
NEGLIGENCE, 1, 2, 3;
PUBLIC LAND, 1 to 11.

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REMOVAL OF CAUSES.

A marshal of the United States, or his deputies, being sued in trespass for seizing particular property under an attachment, to him directed, and defending upon the ground that the property, so seized, belonged to the defendant named in the writ of attachment, may have the case — the amount in dispute being sufficient — removed to the proper Circuit Court of the United States, as one arising under the laws of the United States. *Bock* v. *Perkins*, 628.

See CORPORATION, 2.

SERVICE OF PROCESS.

See ABSENT DEFENDANT.

STATUTE.

A. GENERALLY.

1. A statute duly certified is presumed to have been duly passed until the contrary appears. *In re Duncan*, 449.
2. Whether a state statute has or has not binding force, by reason of compliance or non-compliance with the provisions of the constitution of the State, is a question for the state courts to determine. *Ib.*
3. Whether statutes of a legislature of a State have been duly enacted in accordance with the requirements of the constitution of such State, is not a Federal question, and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States. *Leeper* v. *Texas*, 462.

B. STATUTES OF THE UNITED STATES.

See CUSTOMS DUTIES, 1, 3, 5;
ESTOPPEL, 2;
JURISDICTION, A, 1, 9; C, 1;
LOCAL LAW, 9;
MANDAMUS, 4;
NATIONAL BANK, 3;
PUBLIC LAND, 1, 5, 6, 7, 18, 19, 20.

C. STATUTES OF STATES AND TERRITORIES.

Arkansas. *See* INSURANCE, 1.
Iowa. *See* CORPORATION, 2.
Louisiana. *See* EQUITY, 2; LOCAL LAW, 1; NEW ORLEANS DRAINAGE IMPROVEMENTS, 2, 5.
Massachusetts. *See* FISHERIES.
Montana. *See* NATIONAL BANK, 3.
Nebraska. *See* LACHES, 2.
Tennessee. *See* CORPORATION, 8; LOCAL LAW, 9.

D. CONSTRUCTION OF STATUTES.

See ABSENT DEFENDANT, 1.

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STATUTE OF FRAUDS.

If, after an oral agreement for the sale of land, the purchaser executes a deed, describing the land by metes and bounds, but insufficiently acknowledged to pass title, and sends that deed to the vendor in a letter stating the terms of payment in cash and notes, and requesting payment accordingly; and the purchaser replies by letter, containing a draft of a similar deed with a sufficient acknowledgment, requesting that it be executed instead of the other, and promising, on receipt of it, to "forward money, notes and old deed;" the two letters, and the deed enclosed in the first letter, together, constitute a sufficient memorandum in writing to take the contract out of the statute of frauds. *Bayne* v. *Wiggins*, 210.

SUBROGATION.

See INSURANCE, 2.

TAX AND TAXATION.

See JURISDICTION, B, 4;
NATIONAL BANK, 2, 3, 4.

TAX SALE.

In Kansas, if the description in a deed of land sold for non-payment of taxes departs from the description contained in the assessment roll and the prior tax proceedings, such prior description, if imperfect and insufficient, avoids the deed, although the description in the latter may be sufficient and complete. *Stout* v. *Mastin*, 151.

TERRITORIES.

See NATIONAL BANK, 2, 3, 4.

TIDE WATERS.

See FISHERIES.

TOWN SITE.

See PUBLIC LAND, 12, 13, 14, 15.

TRADE MARK.

1. Words which are merely descriptive of the character, qualities or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade mark. *Brown Chemical Co.* v. *Mayes*, 540.
2. An ordinary surname cannot be appropriated as a trade mark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use even of one's own name, where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it. *Ib.*

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3. The owner of a trade mark, bearing his own name, which is affixed to articles manufactured at a particular establishment, may, in selling the latter, confer upon the purchaser exclusive authority to use the trade mark. *Ib.*

TRANSCRIPT OF RECORD.

See WRIT OF ERROR.

TRUST.

See NEW ORLEANS DRAINAGE IMPROVEMENTS.

ULTRA VIRES.

See CORPORATION, 1, 2, 7, 8.

WITNESS.

The administratrix of her husband's estate commenced suit to recover a claim alleged to be due the estate. She resigned and was discharged, and an administrator *de bonis non* was appointed and qualified, and appeared and obtained leave to prosecute the suit, *Held*, that she was a competent witness for the plaintiff at the trial. *Snyder* v. *Fiedler*, 478.

WRIT OF ERROR.

1. It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. *Leeper* v. *Texas*, 462.
2. No application to this court for a writ of error will be entertained, except when a justice of this court, upon consideration of the record, has deemed it proper, under special circumstances, to endorse thereon a request that counsel be permitted to proceed in that way. *In re Ingalls*, 548.

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